No. 14617

United States
Court of Appeals
for the Ninth Circuit

UP-RIGHT, INC., a corporation, and WALLACE J. S. JOHNSON, Appellants,

vs.

PATENT SCAFFOLDING CO., INC., a corporation, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 229, inclusive.)

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—3-16-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Transcript of Proceedings—(Continued)

Witnesses:

NAMES AND ADDRESSES OF ATTORNEYS

MELLIN, HANSCOM & HURSH,

391 Sutter Street,
San Francisco, California,

Attorneys for Plaintiff and Appellant.

BRONSON, BRONSON & McKINNON,

1500 Mills Tower,
San Francisco, California,

Attorneys for Defendant and Appellee.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 32212

UP-RIGHT, INC., a corporation, and WALLACE J. S. JOHNSON, an individual,

Plaintiffs,

vs.

THE PATENT SCAFFOLDING CO., INC., a corporation,

Defendant.

COMPLAINT

Come Now Up-Right, Inc., and Wallace J. S. Johnson, plaintiffs above named, and for cause of action against the defendant The Patent Scaffolding Co., Inc., allege:

I.

That plaintiff, Up-Right, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in Berkeley, County of Alameda, State of California.

II.

That plaintiff Wallace J. S. Johnson is a citizen of the United States of America and a resident of Berkeley, County of Alameda, State of California.

III.

That plaintiffs are informed and believe and on information and belief allege that the defendant, The Patent Scaffolding Co., Inc., is a corporation of the State of New York, and has a regular and

established place of business in the City and County of San Francisco, State of California, and has designated an agent in the State of California upon whom process may be served in conformity with the laws of the State of California.

IV.

That this Court has jurisdiction of this cause because the same arises under the patent laws of the United States.

V.

That Letters Patent of the United States of America No. 2,618,496 were duly and regularly issued all in accordance with law and plaintiff, Wallace J. S. Johnson is the owner of all of the entire right, title and interest in and to and under said Letters Patent No. 2,618,496 and plaintiff Up-Right, Inc., by virtue of an agreement in writing became the exclusive licensee to make, sell and use the invention of said Letters Patent No. 2,618,496.

VI.

That plaintiffs are informed and believe and on information and belief allege that the defendant The Patent Scaffolding Co., Inc., has, within six years last past and prior to the filing of this complaint, and within the Northern District of California, Southern Division, infringed said Letters Patent No. 2,618,496.

VII.

That plaintiffs are informed and believe and on information and belief allege that defendant has

committed the aforesaid acts of infringement in knowing, wanton and deliberate disregard of the rights of plaintiffs in the premises.

VIII.

That plaintiffs have been damaged by the infringing acts of defendant in an amount unknown to plaintiffs, but plaintiffs are informed and believe and on information and belief allege that said damage is in excess of Three Thousand Dollars ($3,000.00).

Wherefore Plaintiffs Pray:

1. For damages from the defendant in the amount of five per cent (5%) of the sales price of each device manufactured and sold by defendant that is an infringement of said Letters Patent No. 2,618,496.

2. That plaintiffs have judgment against the defendant for reasonable attorneys' fees incurred by plaintiffs in this action.

3. That plaintiffs have judgment against the defendant for their costs and disbursements herein, and for such other and different relief as this Court may deem meet and proper in the premises.

UP-RIGHT, INC. (a corporation)
WALLACE J. S. JOHNSON,
/s/ By JACK E. HURSH,
One of counsel for Plaintiffs.

[Endorsed]: Filed December 12, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Come Now Up-Right, Inc., and Wallace J. S. Johnson, plaintiffs above named, and for cause of action against the defendant, The Patent Scaffolding Co., Inc., alleged:

I.

That plaintiff, Up-Right, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in Berkeley, County of Alameda, State of California.

II.

That plaintiff, Wallace J. S. Johnson, is a citizen of the United States of America and a resident of Berkeley, County of Alameda, State of California.

III.

That plaintiffs are informed and believe, and on information and belief allege, that the defendant, The Patent Scaffolding Co., Inc., is a corporation of the State of New York, and has a regular and established place of business in the City and County of San Francisco, State of California, and has designated an agent in the State of California upon whom process may be served in conformity with the laws of the State of California.

IV.

That this Court has jurisdiction of this cause

because the same arises under the patent laws of the United States.

V.

That Letters Patent of the United States of America No. 2,618,496 were duly and regularly issued all in accordance with law and plaintiff, Wallace J. S. Johnson, is the owner of all of the entire right, title and interest in and to and under said Letters Patent No. 2,618,496 and plaintiff, Up-Right, Inc., by virtue of an agreement in writing, became the exclusive licensee to make, sell and use the invention of said Letters Patent No. 2,618,496.

VI.

That plaintiffs are informed and believe, and on information and belief allege, that the defendant, The Patent Scaffolding Co., Inc., has, within six (6) years last past and prior to the filing of this complaint, and within the Northern District of California, Southern Division, infringed said Letters Patent No. 2,618,496.

VII.

That plaintiffs are informed and believe, and on information and belief allege, that defendant has committed the aforesaid acts of infringement in knowing, wanton and deliberate disregard of the rights of plaintiffs in the premises.

VIII.

Plaintiffs have placed the required statutory notice on articles manufactured and sold under said

Letters Patent, and have given written notice to defendant of said infringement.

IX.

That plaintiffs have been damaged by the infringing acts of defendant in an amount unknown to plaintiffs, but plaintiffs are informed and believe, and on information and belief allege, that said damage is in excess of Three Thousand Dollars ($3,000.00).

Wherefore Plaintiffs Pray:

1. For damages from the defendant in the amount of Five Per Cent (5%) of the sales price of each device manufactured and sold by defendant that is an infringement of said Letters Patent No. 2,618,496.

2. That plaintiffs have judgment against the defendant for reasonable attorneys' fees incurred by plaintiffs in this action.

3. That plaintiffs have judgment against the defendant for their costs and disbursements herein, and for such other and different relief as this Court may deem meet and proper in the premises.

UP-RIGHT, INC. (a corporation)
WALLACE J. S. JOHNSON,
/s/ By OSCAR A. MELLIN,
One of Counsel for Plaintiffs.

[Endorsed]: Filed February 25, 1953.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

The defendant, The Patent Scaffolding Co., Inc., makes answer to the amended complaint, as follows:

1.

Defendant admits the issuance of Letters Patent No. 2,438,173, but denies that said Letters Patent were duly and regularly issued, all in accordance with law.

Defendant denies that said Johnson is the owner of all of the entire right, title and interest in and to said Letters Patent No. 2,618,496, since paragraph V of the complaint makes allegation to the contrary.

The allegation in the complaint states that plaintiff, Upright, Inc., by virtue of an agreement in writing, became the exclusive licensee to make, sell and use the invention of said Letters Patent, which allegations constitute an assignment of the patent to Upright, Inc.

2.

The defendant denies each and every allegation in paragraph VI of the amended complaint.

3.

The defendant denies each and every allegation of paragraph VII of the amended complaint.

4.

The defendant denies each and every allegation

of paragraphs VIII and IX of the amended complaint.

5.

The defendant alleges "not guilty" to the prayers.

The defendant denies prayers I and II. No basis in the complaint has been made in support thereof.

The defendant denies prayer III.

6.

As a first affirmative defense: The Patent No. 2,438,173 is invalid as setting forth only an unpatentable combination.

7.

As a second affirmative defense: The Patent No. 2.438.173 has been patented or described in a printed publication prior to the patentee's supposed invention or discovery thereof, more than one year prior to the patentee's application for a patent therefor, to wit:

1. John M. Athans, U.S. No. 1,679,017 of July 31, 1938, for "Service Table."

2. F. Moore, U.S. No. 2,184,358 of Dec. 26, 1939, for "Adjusting Means."

3. F. Nielsen, U.S. No. 1,001,069 of Aug. 22, 1911, for "Pipe Coupling."

4. G. A. Hinckley, U.S. No. 135,988 of Feb. 18, 1873 for "Mechanism for Operating and Feeding Oil Wells."

8.

As a third affirmative defense: That the patentee was not the original and first inventor or discoverer

of any material or substantial part of the thing patented, on information and belief.

The following prior art patents, in addition to the patents listed in the preceding paragraph 7, show the general state of the art prior to the time the patentee entered the field:

1. C. W. Clattenberg, U.S. No. 953,896 of April 5, 1910 for "Turnbuckle Center."

2. E. T. Sutley et al, U.S. No. 467,866 of January 26, 1892 for "Temper Screw."

3. G. E. Turney, U.S. No. 1,432,810 of October 24, 1922, for "Temper Screw."

4. Clarence T. Mapes, U.S. No. 854,512 of May 21, 1907, for "Yoke and Yoke Screw."

5. E. Michelin, U.S. No. 750,675 of Jan. 26, 1904, for "Safety Bolts."

6. L. J. Davis, U.S. No. 1,840,187 of Jan. 5, 1932, for "Brake Rod."

9.

As a fourth affirmative defense: The prayer of the complaint asks for a fixed royalty. Defendant alleges that plaintiffs have not issued licenses with a regular and established uniform royalty. The plaintiffs have arbitrarily fixed the percentage in their complaint. On that allegation, the question of the fact of damage has been omitted, which is necessary to decide before the extent of damage can be shown. There is nothing to decide as a question of fact as to this royalty, if the amount mentioned stands alone. This leaves open for decision only the validity and infringement of the said patent, which are questions of law for the court, and not for the

jury, particularly because there cannot be a conflict as to the facts set forth in each of the said simple patents set up herein by the defendant.

10.

As a fifth affirmative defense: Plaintiff did not allege in its amended complaint that defendant infringed, since the issuance of the patent in suit, nor that any notice of the patent in suit and its alleged infringement was given to defendant prior to the defendant's acts alleged to be an infringement.

11.

As a sixth affirmative defense: There is no patentable invention in means for adjusting. There is no patentable invention in the patent in suit.

Wherefore, the plaintiffs should be dismissed as without law, with taxable costs and disbursements.

Dated March 24, 1953.

THE PATENT SCAFFOLDING CO., INC.,
/s/ By V. W. MENG, President

/s/ C. P. GOEPEL,
/s/ J. E. TRABUCCO,
Attorneys for Defendant
/s/ E. D. BRONSON, of Counsel

Acknowledgment of Service attached.

[Endorsed]: Filed March 30, 1953.

[Title of District Court and Cause.]

MEMORANDUM DECISION

After the conclusion of the presentation of the evidence in this patent infringement case before a jury, both sides agreed to the dismissal of the jury and to the submission of the cause to the Court. It was also agreed that the Court's decision upon the issue of the validity of plaintiffs' patent would be decisive of the cause, i.e., a finding of validity would warrant judgment for injunction and damages, whereas a finding of invalidity would mean judgment for defendant.

In my opinion, the issue of validity here is one of law, or, at least, a mixed question of law and fact. The patent in suit claims an alleged invention of a portable scaffold leg. Plaintiffs contend it satisfies legal standards of invention because it is a combination of elements constituting a new unitary structure, having a new function and new results. To the contrary, it is contended that the patent discloses only old mechanical elements, aggregated, and therefore not inventive.

The controversy thus tendered is familiar. Decisions in the Ninth and other circuits in this field are many. The rule of law is clear and hence there is no need of citing the cases. A comparison of the prior art patents and the plaintiffs' patent, gives the answer.

In my opinion, all of the elements aggregated by plaintiffs function as taught in the prior art pa-

tents. Plaintiffs did not change nor bring to light anything new in the functioning of these elements. Hence the result is aggregation and not a patentable combination. It is good artisanship. But that is not enough to gain the reward of monopoly, which the Statute grants to the inventor. "He, who is merely the first to utilize the existing fund of public knowledge for new and obvious purposes must be satisfied with whatever fame, personal satisfaction, or commercial success he may be able to achieve. Patent monopolies, with all their significant economic and social consequences, are not reserved for those who contribute so insubstantially to that fund of public knowledge." Dow Chemical Co. vs. Halliburton Oil Wells Cementing Co., 324 U.S. 320. See also Gomez vs. Granat Bros., 9 Cir., 177 F.2d 266.

Counsel for defendant will present findings and conclusions in its favor.

Dated: October 27, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed October 27, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the above-entitled Court in the department of the Honorable Louis E. Goodman; a jury having been impaneled and sworn, and evi-

dence, both oral and documentary, having been submitted by both plaintiffs and defendant; thereafter and during the course of the said trial, both sides having stipulated that the jury be discharged and that the issues of the said case be submitted to the Court for determination; the testimony being concluded and the parties, plaintiffs and defendant, having submitted in writing their respective memoranda of points and authorities; the Court having considered the evidence herein, both oral and documentary, and the law applicable, does now make its

Findings of Fact

I.

On December 12, 1952, Up-Right, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of California, and had a place of business in Berkeley, County of Alameda, State of California.

II.

On December 12, 1952, The Patent Scaffolding Co., Inc. was a corporation of the State of New York, and had a regular and established place of business in the City and County of San Francisco, State of California.

III.

On December 12, 1952, Wallace J. S. Johnson was the owner of the entire right, title and interest in and to and under the Letters Patent No. 2,618,496, granted on November 18, 1952, on an application filed September 15, 1947, and Up-Right, Inc. was

the exclusive licensee to make, sell and use the invention of said Letters Patent.

IV.

On December 12, 1952, plaintiffs Up-Right, Inc. and Wallace J. S. Johnson filed a complaint for patent infringement against the defendant in Civil Action No. 32212 charging infringement by the defendant of said Letters Patent.

V.

On or about February 28, 1953, plaintiffs filed their amended complaint herein.

VI.

On or about March 24, 1953, defendant filed its answer to the amended complaint alleging invalidity of United States Patent No. 2,618,496 on the grounds that said patent sets forth only an unpatentable combination; that the invention claimed in the application for said patent had been described, prior to its filing date of September 15, 1947, in various printed publications, for more than one year prior to the patentees application for patent.

VII.

The essential elements of the single claim of the patent in suit are disclosed in the patents to: Countryman, 1,912,475; Taylor, 747,270; Burns, 1,181,-734; Stevens et al., 351,474; Hinckley, 135,988; Birch, 210,235; Michelin, 750,675; Mapes, 854,512; Moore, 2,184,358; Uecker, 2,203,114; and Athans,

1,679,017. All of the said patents had been issued more than one year prior to the filing of the application which resulted in the patent in suit.

VIII.

Calipers embodying adjustments substantially like those in the patent in suit were well known for one year prior to the filing of the application which resulted in the patent in suit, as evidenced by defendant's Exhibit O and the Stevens Patent No. 351,474.

IX.

The Patent Office, in issuing the patent in suit, failed to consider the most pertinent art, specifically the patents listed in Finding VII.

X.

All of the elements of the claim in suit as aggregated by plaintiffs function as taught in the prior art patents.

XI.

Plaintiffs did not change, or bring to light, anything new in the functioning of these elements. The result of the claim in suit is aggregation.

XII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, an adjustable supporting leg having telescopic leg members was well known as evidenced by Athans, 1,679,017; Moore, 2,184,358; Countryman, 1,912,475; and Uecker, 2,203,114.

XIII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, an adjustable supporting leg having telescopic leg members and a clutch for holding such leg members against relative displacement was well known as evidenced by Athans, 1,679,017; Moore, 2,184,-358; and Countryman, 1,912,475.

XIV.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, an adjustable supporting leg having telescopic leg members, the inner leg member of which is threaded and the outer leg member carries a releasable split nut engaging with the threads of the inner leg member and a releasable slidable collar holding the parts of the split nut in gripping relation with the threaded inner leg member, was well known as evidenced by Countryman, 1,912,475.

XV.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, a structure having inner and outer telescopic members, the inner member having a threaded portion and the outer member carrying a split nut engaging with the threaded portion of the inner member, and a releasable collar holding the parts of the split nut in clutching engagement with the said threaded portion of the inner member, was well known as evidenced by Countryman, 1,912,475; Tay-

lor, 747,270; Burns, 1,181,734; Stevens, 351,474; Hinckley, 135,988; Birch, 210,235; Michelin, 750,-675; and Mapes, 854,512.

XVI.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, telescopic leg members held against relative movement by a releasable clutch, wherein the inner leg member has an enlarged cylindrical portion engaging with a complimentary bearing surface on the outer leg member to prevent lateral movement between the telescopic leg members, and wherein the cylindrical enlargement prevents the complete detachment of the telescopic leg members when the clutch is in gripping engagement with the inner leg member, were old as evidenced by Moore, 2,184,358.

XVII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, a supporting leg having telescopic leg members, the inner leg member of which has a smooth cylindrical portion fitting within and against a complimentary bearing portion of the inner surface of the outer leg member, was well known as evidenced by Uecker, 2,203,114, and Moore, 2,184,358.

XVIII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, inner and outer telescopic adjustable members,

the inner member having a threaded portion and the outer member carrying a split nut releasably held by a sliding collar in gripping engagement with the threaded portion of the inner member, and wherein the inner and outer members were capable of rapid adjustment with respect to each other by the release of the collar so the split nut no longer secures the said members against relative engagement, and wherein the two members were capable of fine adjustment with respect to each other as to overall length by the turning of the inner member while the split nut is held by the collar in gripping engagement with the inner member, were well known as evidenced by Taylor, 747,-270; Burns, 1,181,734; Stevens, 351,474; Hinckley, 135,988; Mapes, 854,512; and Countryman, 1,912,-475.

XIX.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, a supporting leg having telescopic leg members, the outer leg member having integral resilient fingers on its lower end, and a releasable collar for holding the resilient fingers in binding engagement with the inner leg member, was well known as evidenced by Athans, 1,679,017.

Conclusions of Law

I.

This Court has jurisdiction of the cause because the same arises under the patent laws of the United States.

II.

The claim of the patent in suit does not present a patentable combination.

III.

The structure of the patented claim fails to present a patentable invention.

IV.

The patented claim is invalid.

V.

The complaint is dismissed with costs to the defendant.

Dated: November 18, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed November 18, 1954.

In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 32212

UP-RIGHT, INC., a corporation, et al.,
Plaintiffs,

vs.

THE PATENT SCAFFOLDING CO., INC., a corporation,
Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial before the above-entitled Court in the department of the Honorable Louis E. Goodman, the plaintiffs being represented by Mellin, Hanscom & Hursh, Oscar E. Mellin and Jack E. Hursh, and the defendant being represented by C. P. Goepel, J. E. Trabucco, Bronson, Bronson & McKinnon and E. D. Bronson; a jury having been impaneled and sworn; evidence, both oral and documentary, having been submitted by both plaintiffs and defendant; thereafter and during the course of said trial, both sides having stipulated that the jury be discharged and that the issues of the said case be submitted to the Court for determination; the testimony being concluded and the parties, plaintiffs and defendant, having submitted in writing their respective memoranda of points and authorities; the Court having considered the evidence herein, both oral and documentary, and the law applicable, and having heretofore made its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed

(1) the Johnson Patent No. 2,618,496 is invalid and void;

(2) the plaintiffs are not entitled to recover damages from defendant; and

(3) defendant recover from plaintiffs its costs and disbursements in the sum of $.....

Dated this 18th day of November, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

Approved as to Form:

MELLIN, HANSCOM & HURSH,
/s/ By LEROY HANSCOM,
Attorneys for Plaintiffs

[Endorsed]: Lodged November 10, 1954.

[Endorsed]: Filed November 18, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs above named, Up-Right, Inc., a corporation, and Wallace J. S. Johnson, an individual, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment for Defendant, The Patent Scaffolding Co., Inc., a corporation, and

against Plaintiffs, dated November 18, 1954, and entered in this action on November 19, 1954.

Dated: December 7, 1954.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs

[Endorsed]: Filed December 7, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the plaintiffs have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment of this court entered

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, United Pacific Insurance Company, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Plaintiff, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case

of a breach of any condition hereof, the above entitled Court, may upon notice to the Surety of not less than ten (10) days proceed summarily in the above entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of rule 34 of the Rule of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company, is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 2nd day of December, 1954.

[Seal] UNITED PACIFIC INSURANCE COMPANY,

/s/ By ROBERT M. CARLTON,
Attorney-in-Fact

Notary Public Certification attached.

[Endorsed]: Filed December 7, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below,

are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by both parties:

Complaint.

Amended Complaint.

Answer to Amended Complaint.

Memorandum Decision.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Concise Statement of Points upon which Plaintiffs-Appellants Intend to Rely on Appeal.

Designation of Contents of Record on Appeal.

Designation of Defendant and Respondent of additions and objections to portions of the record on appeal designated by Plaintiffs.

One Volume of Reporter's Transcript of Trial Proceedings.

Plaintiffs' Exhibits 1 through 8, 8A, 10A, and 11 through 19, inclusive.

Defendant's Exhibits A, D through S, inclusive.

Note: (Plaintiffs' Exhibits 6, 7, 8, 10, 11, 12 and 19 and 8A, and 10A and Defendant's Exhibits Q and R are large exhibits and are in the exhibit room on mezzanine floor.)

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 12th day of January, 1955.

[Seal] C. W. CALBREATH,
Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 32212

UP-RIGHT, INC., a corporation, and WALLACE J. S. JOHNSON, Plaintiffs,

vs.

PATENT SCAFFOLDING COMPANY, a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

June 16, 17, 18, 1954

Before: Hon. Louis E. Goodman, Judge.

Appearances: For Plaintiffs: Messrs. Mellin, Hanscom & Hursh, by Oscar A. Mellin and Jack E. Hursh. For Defendant: Messrs. Bronson, Bronson & McKinnon, by Roy A. Bronson and J. E. Trabucco. [1*]

* * * * *

Mr. Bronson: Could I be heard a moment before the opening statement? This, if the Court please, is in the nature of a suggestion to the Court regarding procedure and it is in the interests of time.

The device involved here is a simple mechanical principle easily understood and explained; it won't involve the credibility of any witnesses. It has occurred to me to suggest to the Court, since the primary consideration here is whether the plaintiff

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

has a valid patent under the rules, that I should suggest to the Court that the Court might hear that aspect of the thing in the interests of time before the case that might later be submitted to the jury is heard. I have this in mind: It is a simple mechanical principle that involves elements that are easily understood. I won't argue the case here in the presence of the jury, but it presents strictly a matter of law without the introduction of any evidence. [3] * * * * *

WALLACE J. S. JOHNSON

was called as a witness on behalf of the plaintiff herein, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated.

The Clerk: Please state your full name to the Court and to the Jury.

The Witness: Wallace J. S. Johnson.

Direct Examination

Mr. Mellin: Q. Will you give your age and your residence, Mr. Johnson?

A. I live at 2 Wilson Circle, in Berkley, California. I am 41 years of age. [9]

Q. What is your occupation?

A. I am President and General Manager of the Up-Right Scaffolding Company.

Q. And what was your formal training or education, Mr. Johnson?

A. I graduated from the California Institute of

(Testimony of Wallace J. S. Johnson.)

Technology in Pasadena with a Bachelor of Science Degree in Mechanical Engineering.

Q. And what have been your occupations briefly from the time you left school?

A. That was in 1935. From 1935 until 1948 I was factory foreman for the Proctor and Gamble Company in Long Beach, where I was concerned with engineering in the manufacture of soap, the processes. From 1938 until approximately 1941 I was the manager and chief engineer of a firm whose name was Autometric Machine Tool Company in Berkeley, California. Later the name was changed to Production Engineering Company. And in that connection I was in charge of the design and the general manufacture and sale of jig boring machines which are very complicated process machines for the accurate measuring and boring of holes in jigs, tools and fixtures.

From 1942 to approximately 1945, I was with the Joshua Hendy Iron Works. The principal office of that Company was in Sunnyvale, California, but I had three principal locations with that concern; first, with the Eastern Division in [10] Ampere, New Jersey, where I was concerned with the redesign and the getting into production of an electrically operated gun turret for the U. S. Air Force. After that I was for a period of about a year assistant manager and Chief Engineer of the Pomona, California division of this Company where I was concerned with the manufacture of a complete line of pumps, principally irrigation pumps, but also for

(Testimony of Wallace J. S. Johnson.)

industrial and other purposes. And then the principal appointment I had with Joshua Hendy was in the Sunnyvale Plant where I was, among other things, in charge of the designing and development of new post-war products.

In 1945 I went into business for myself as a consulting engineer, mechanical engineer.

Q. And from there——

A. During 1945 and '46, I worked as a consulting engineer. Perhaps the main project which I did during that period was the design of a complete line of irrigation pumps for a concern in Monterey, Mexico. They are now manufacturing those pumps.

Q. And when did you become associated with Up-Right, Inc., the plaintiff here?

A. The business started as a personal proprietorship. We were called Up-Right Scaffolds.

Q. Who were the proprietors?

A. I was the proprietor. And that failed during the year [11] 1947, which was our first year of manufacturing. On January 1st, 1948, we incorporated, I and two other stockholders, and since January 1st of 1948, it has been a corporation.

Q. And where is the Up-Right, Inc. located, Mr. Johnson?

A. Its principal office, its head office is in Berkeley at 1013 Pardee Street, and our Western factory is there; and we have an Eastern factory in Teterboro, New Jersey.

Q. What is the principal product of that Company?

(Testimony of Wallace J. S. Johnson.)

A. We manufacture portable aluminum scaffolds.

Q. Over what territory are those scaffolds sold?

A. We have sold them in all states of the United States and in several foreign countries.

Q. And over what period of time, Mr. Johnson?

A. Starting February 28, 1947, when we made our first shipment, until the present time.

Q. As of about February 1st, 1953, how many employees, roughly, did Up-Right Inc. have?

A. Approximately 90 employees.

Q. I hand you United States Letters Patent No. 2,618,496 which were issued the 18th day of November, 1952, and ask you if you are the Wallace J. S. Johnson named as the patentee therein?

A. Yes, I am.

Mr. Mellin: I will offer that in evidence, Your Honor, as Plaintiff's Exhibit 1. [12]

(Whereupon, U. S. Letters Patent No. 2,618,496 was received in evidence and marked Plaintiff's Exhibit No. 1.)

[See Book of Exhibits.]

The Court: What is the date?

Mr. Mellin: The date is November 18, 1952, Your Honor. And by the way, Your Honor, there has been some question heretofore raised on the question of notice of the patent to the defendant, and for that purpose we on the record waive damages prior to December 12, 1952, which is the date that the original complaint was filed in this action. We are contending for damages only from the date

(Testimony of Wallace J. S. Johnson.)

of the filing of the original complaint to the date of filing the amended complaint.

Mr. Mellin: Q. Mr. Johnson, what interest, if any, does Up-Right Scaffold Company, Inc. have in this patent, Exhibit No. 1?

A. Up-Right, Inc., the Corporation, has an exclusive license to manufacture and sell devices embodying the invention sold in the patent. [13]

* * * * *

Mr. Mellin: Q. Was that license granted to the Up-Right, Inc. in writing or orally, Mr. Johnson?

A. It was a written agreement, contract.

Q. I hand you what purports to be a license agreement dated January 5, 1948 between Wallace J. S. Johnson and Up-Right, Inc., a Corporation, and ask you if you can identify that agreement?

A. Yes, this is the exclusive license agreement between me and Up-Right, Inc.

Q. Does that pertain to the patent in suit, Exhibit 1?

A. Yes, it includes this particular patent.

Q. Is that your signature on the agreement?

A. Yes.

Q. And the other signature is——

A. W. F. Funk, who is secretary-treasurer of the Corporation. [14]

Mr. Mellin: I will offer this document in evidence as Plaintiff's Exhibit No. 2.

Mr. Bronson: No objection.

(Whereupon Agreement dated 1-5-48 between Johnson and Up-Right, Inc. referred to and

(Testimony of Wallace J. S. Johnson.)

described above was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Mellin: At this time, Your Honor, I would like to offer in evidence on behalf of the plaintiff a certified copy of the proceedings had in the Patent Office referring to the issuance of the patent in suit, Exhibit No. 1.

Mr. Bronson: Counsel, you call that the file wrapper?

Mr. Mellin: File wrapper.

Mr. Bronson: May we refer to it for the benefit of the Court and Jury as the file wrapper?

The Court: Yes. The proceedings before the Patent Office when you apply for a patent, instead of being called a record, they call it the file wrapper. I don't know why that is, but that is the name.

(Whereupon file wrapper of Patent No. 2,618,496 was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Mellin: At that time the Patent Office referred to certain prior United States Patents in passing on the application, and I offer those patents in evidence as [15] plaintiff's next in order.

(Whereupon certain prior patents referred to were received in evidence and marked Plaintiff's Exhibit No. 4.)

[See Book of Exhibits.]

Mr. Mellin: Q. With respect to the agreement, Exhibit 2, Mr. Johnson, are there any other agreements that you or the Company made with reference to the patent in suit, Exhibit 1? A. No.

(Testimony of Wallace J. S. Johnson.)

Q. And the agreement, Exhibit 2, is that to your knowledge still in force and effect, or not?

A. It is still in force and effect, yes.

Q. Will you state briefly the purposes for which Up-Right, Inc. was formed?

A. The Corporation of that name was formed to take over the new scaffold business which had been started as a personal proprietorship approximately a year before that.

Q. In connection with what, if any, products?

A. It was incorporated for the manufacture and sale of portable aluminum scaffolds.

Q. Will you state whether or not you conducted any development work in connection with those scaffolds prior to the forming of the corporation?

A. Yes; as early as December 1945, another man named Thomas Harvey and I worked out an idea for a folding scaffold section—portable folding section. [16]

Q. Is that the aluminum portable type that you have been speaking of? A. Yes, that's right.

Q. Well, will you state whether or not that was the type that you manufactured? [17]

* * * * *

Q. And will you state whether or not that was the type you did the development work in connection with?

A. In that period from December of '45 until February of '47, that was the type, yes.

Q. I show you letters patent of the United States No. 2,438,173, March 23, 1948 to yourself and

(Testimony of Wallace J. S. Johnson.)

Mr. Thomas H. Harvey entitled "Portable and collapsible scaffolding unit," and I will ask you if that illustrates the type of scaffold on which you did development work during that period that you have testified to?

A. Yes, this patent covers that invention.

Mr. Mellin: May I offer that, Your Honor, in evidence, as plaintiff's next in order?

(Thereupon letters patent No. 2,438,173 referred to above was received in evidence and marked Plaintiff's Exhibit No. 5.)

[See Book of Exhibits.]

Mr. Mellin: Q. Referring to Exhibit 5, Mr. Johnson, would you tell us what if any type of adjustments were possible with that with respect to elevating any part of the scaffold?

A. This patent wasn't concerned with the adjustable legs on the scaffold.

Mr. Mellin: Would you read him the question, please?

Q. I am asking you if it discloses any type of adjustable legs, Mr. Johnson? A. No.

Q. At the time that you and Mr. Harvey developed the scaffolding [18] shown in the patent, Exhibit 5, what did you do with respect to adjustment of legs in the matter?

* * * * *

A. We—Mr. Harvey and I, if you are including the two of us in the word "you"—did nothing about it because he was getting involved in another business and had other employment and other interests;

(Testimony of Wallace J. S. Johnson.)

but I started working on the problem of developing an adjustable leg because I realized that that was essential to make the new portable aluminum scaffolding possible—practical. [19]

Mr. Bronson: I ask that the latter part of the answer go out as not responsive, talking about conclusions.

The Court: That part of the answer starting "because I realized" may go out.

Mr. Mellin: Q. Will you state whether any problem presented itself to you at that time with respect to adjustment vertically of a scaffold unit of this type?

A. The problem that presented itself to me at that time was that a portable aluminum scaffold needed an adjustable leg.

Q. And did you make any investigation at that time or not with respect to devices that could be employed for that purpose? A. Yes.

Q. And will you tell us what those investigations were and what you found in them?

A. Investigations that were made during that time included examination of all the types of scaffolds that were commercially on the market in this area. They included studying and review of all types of adjustable mechanisms in the engineering and technical literature in libraries and in text books.

Q. And will you state whether or not you found in those investigations any devices which answered

(Testimony of Wallace J. S. Johnson.)
the problem which you stated was existent at that time? [20]
* * * * *

Mr. Mellin: Q. Mr. Johnson, what requisites were required for adjustability of the scaffold of the type you designed?

A. For a portable scaffold there were a number of what I thought to be severe requirements. For one thing, the scaffold leg or adjustable mechanism of whatever kind it was, [22] had to be so fixed within the structure or the tubular outer leg of the scaffold that it would sustain sidewise loads as well as vertical loads, because in a portable scaffold which rolls by itself from position to position it normally is not fastened to a building or other structure which will take side loads, and therefore the scaffold had to—the leg had to be strong adjusted in any position so that sidewise it wouldn't buckle. That would be one very important characteristic of it.

Another would be that the scaffold would have to take a vertical load in any position of the adjustment, because the entire weight of people or material on the scaffold would rest directly on the legs of the scaffold, and it being unattached to anything else, it would have to absorb all that load by itself.

Another characteristic of the leg would have to be that it was firmly and positively locked within the structure of the scaffold, because you see moving it along from position to position implies rolling it over curbings or other holes in the ground or floor,

(Testimony of Wallace J. S. Johnson.)

and the leg couldn't by any means fall out, either by the fact that it wasn't frictionally tight in there or it was just loose in there; it had to be positively locked in there so when it was rolled over a hollow point in the floor or ground it wouldn't fall out.

Another requirement was that it had to be able to be adjusted for a coarse or a large adjustment quickly and easily, because the inherent nature of the concept of the scaffold was that it had to be easily moved from position to position and each position had a different conformation of the ground or terrain, so that instead of something that had to be laboriously screwed or otherwise adjusted up and down it had to have a rapid adjustment quick and easy over a considerable distance.

I should say another characteristic that it requires for a portable concept of scaffold is that it have a fine adjustment so that after you made the coarse adjustment and you are up on top of a structure which is depending entirely upon itself for its stability and a fine adjustment had to be made so that it can have no wobble in the structure—if it were stationary or static form of scaffolding fastened to a wall, it wouldn't be so important then to have a fine adjustment so that it would be stable when it was adjusted.

Q. At the time when you went into this portable scaffold business was there a commercial device as far as you know in portable scaffolding of the nature that you described in this scaffolding field?

(Testimony of Wallace J. S. Johnson.)

A. No, sir. [24]

* * * * *

Mr. Mellin: Q. Will you answer, Mr. Johnson?

A. As far as I knew there was no such device on the market.

Q. And in the order—in the chronological order of things did this adjustable leg that forms the subject matter of the patent in suit Exhibit 1, come with this earlier conception of your scaffold or not?

A. No, it came later.

Q. You are familiar of course, with the features of the patent in suit, Mr. Johnson?

A. Yes.

Mr. Mellin: This is an enlargement. I will hand it to the Court—an enlargement of the patent drawing colored up so it can be explained. I offer that, Your Honor, in evidence as the next in order. It is an enlargement of the patent drawing of the patent in suit, Exhibit 1, which has been colored.

(Thereupon enlargement referred to above was received in evidence and marked Plaintiff's Exhibit No. 6.) [25]

(Thereupon Plaintiff's Exhibit No. 6 was placed upon the board.)

Mr. Mellin: Q. Mr. Johnson, from the enlargement of the patent drawing, Exhibit 6, that we have put on the board and its coloring, would you take a pointer and explain the construction and the operation of the device therein illustrated; and while you are doing it, would you point out whether

(Testimony of Wallace J. S. Johnson.)

it has or has not the characteristics to which you referred?

Your Honor, may I hand you a copy of the patent so that you may follow it.

The Court: Yes.

The Witness: The upper part of this structure with the large number of little numbers on it comprises the scaffold.

Mr. Mellin: Q. Just a minute, Mr. Johnson. Does that in a general way indicate a scaffolding unit of approximately the size and construction of that I have my hand on in court?

A. Yes, approximately. And it is supported by four legs which are shown on different levels to illustrate the fact that those legs are adjustable to accommodate the scaffold to an uneven surface.

Q. Just a moment, Mr. Johnson. I hand you a portion of the device or scaffold and ask you if this accurately illustrates the device of the patent in suit.

A. Except that this is shortened for the purpose of being [26] grasped, this device accurately describes the device under controversy here.

Mr. Mellin: May I offer that in evidence, Your Honor, as next in order.

(Whereupon illustrative device was received in evidence and marked Plaintiff's Exhibit No. 7.)

The Witness: Each one of these four——

Mr. Mellin: Q. Just a minute, Mr. Johnson, please.

(Testimony of Wallace J. S. Johnson.)

I hand you Exhibit No. 7, the mechanical device which you have testified illustrates the device of the patent in suit, and ask that you use that device in conjunction with the drawing so that you will be able to fully explain the construction and mode of operation of the device?

A. This device which I hold in my hand would correspond to numbers ten and seventeen as indicating the over all elements of each one of these four legs. And in Figure 2, I would say that this figure illustrates the same thing that this model does in the way of one of the individual legs. Figure 2 shows——

Q. Figure 2, is that showing the hollow part of the leg cut longitudinally in half, that is, in sections?

A. Yes, this Figure 2 is a vertical cross-section right through the outer part of the leg so that you can see the inner leg inside it.

Q. What does the piece that is colored yellow indicate, [27] Mr. Johnson?

A. The portion of the inner leg that is colored yellow is the threaded portion of the inner leg, the same as this exposed threaded portion of it.

Q. Of Exhibit 7? A. Yes.

Q. And the part colored red is what, Mr. Johnson, on the drawing?

A. The part colored red shown in cross-section —vertical cross-section as if you took a slice right down through it in the drawing—is this outer collar of Exhibit 7.

(Testimony of Wallace J. S. Johnson.)

Q. And what is the part colored green on the drawing?

A. Well, there are two parts colored green. Light green is the——

Q. Light green, then.

A. Light green shows the outer tubular leg corresponding to this outer tubular leg of the scaffold structure.

Q. That is a fixed leg, it is part of the whole scaffold unit, is that correct?

A. Yes, that comprises—that is a part; it is a vertical column or post of the scaffold.

Q. And what is the dark green?

A. The dark green——

Q. Referring to both Figure 2 and Figure 3, Mr. Johnson?

A. The dark green portion shown in cross-section in Figure 2 [28] and shown exposed in side view in Figure 3 is the nut which is a part of and rigidly welded and attached to the light green tubular leg or post of the scaffold. By raising the collar on this model, I can show you the same thing. This portion, the larger outside diameter welded to the end of this tube, is the nut.

Q. Would you go on from there and explain its use and mode of operation, Mr. Johnson?

A. The nut has been split into segments as shown in Figure 3, and as you see in the model, after being welded on to the end of the tube, so that the segments of the nut are a part of each one of these fingers, you might call them.

(Testimony of Wallace J. S. Johnson.)

Q. Fingers. Is that labeled in Figure 3 of the drawings, Mr. Johnson?

A. No. 21 seems to point to one of the fingers or to the complete nut. The splits are shown at 19 on the drawing.

Q. What is the effect of splitting that nut and splitting the bottom of the tube into these fingers?

A. The effect of splitting that nut and tube to cause the creation of those fingers is so that the nut will open up when the collar is raised and therefore disengage itself from the threads of the inner leg.

Q. The interior of the nut, as I understand it, is threaded to match the threads from the interior leg?

A. The interior of the nut has a corresponding internal [29] thread which fits the external thread of the inner leg.

The Court: When the collar is down?

The Witness: When the collar is down.

The Court: Then the space is eliminated and the whole portion of the collar is sealed all around, is that right?

The Witness: Yes, when the collar is down it moves the segments of the nut back into the original relationship they were in before the nut was split, or the tube was split, and it then is in effect a solid nut which can be rotated like a screw thread on the inner leg.

Mr. Mellin: Q. When you rotate it like a screw thread, what adjustment if any is effected?

A. When the nut is rotated on the screw thread,

(Testimony of Wallace J. S. Johnson.)
it provides an upward or downward adjustment of the scaffold leg.

Q. All right; will you proceed from there, Mr. Johnson?

A. The fine adjustment is accomplished by screwing the leg, the inner leg, in and out of the nut, because you see the scaffold structure, this outer tubular leg is stationary to the inner leg and is turned to adjust the scaffold. For coarse adjustment, one of the other features required of a portable scaffold, the collar is raised and then the structure can be raised up and down great distances—far more than on this short model—to make a rapid major adjustment in the level of the scaffold so that you don't laboriously have to screw the inner leg up and down so many turns per inch by [30] hand.

Q. What about its ability, if it has such, to be able to have a man unscrew the entire leg from the scaffold?

A. The inner threaded leg has an unthreaded portion, No. 17 here shown in blue, which unthreaded portion of the leg is long enough so that it remains inside of the scaffolding structure or column or tube all the time and prevents the leg from ever being extended out too far. In other words, that unthreaded portion, no matter if the leg is badly extended, cannot thread itself through the nut, nor is it possible for the nut to be clamped on that unthreaded portion of the tube. Therefore that unthreaded portion is always down inside of the

(Testimony of Wallace J. S. Johnson.)

scaffold leg to give the scaffold sideways stability, so that the leg won't buckle. If this unthreaded portion were not there, the leg could be foolishly or otherwise by a workman unscrewed entirely to where there were just a few teeth holding and the scaffold would be buckling as you would push on it. So the unthreaded portion on this inner leg provides that sideways stability that is necessary in a portable aluminum scaffold, and it also has the function of making sure that whenever the nut is engaged, this leg cannot fall out.

In other words, if you roll from a position to position as you are using this scaffold, over a hollow place on the floor or ground, as long as this nut is engaged it is never possible for that mechanism to fall out; it has this securely [31] fastened outer part to the inner part that is a threaded nut.

Q. What would you say about its ability to sustain a load?

A. Its ability to sustain a vertical load?

Q. Yes.

A. The fact that this nut was a solid nut welded right on to the end of this full vertical outer tube which is the first column of the scaffold, and the only thing that has been done to it when the nut is in its position with the collar down, in engagement with the collar, the only thing that there is is these few slits through the sides of this nut and tube, and for all practical purposes the nut and tube are just as strong as they were before it was split. Tests have indicated that also, and therefore

(Testimony of Wallace J. S. Johnson.)

the leg mechanism will hold as great a load as the scaffold structure itself. It is very important that the leg not be a relatively weak thing; otherwise your scaffold would be resting on a weak foundation.

Q. Would you state whether or not there is any ability in that to jar the nut loose in operation?

A. That is another point that I haven't had a chance to mention before. That is an essential feature of a portable scaffold, in that when they are moving from position to position on wheels, things tend to jiggle or vibrate the structure, which is a problem not encountered in a static scaffold. Therefore it is important that when this mechanism is locked—in other words, the collar down over the nut as [32] you see it in this position,—that there be no tendency for the collar to ride up due to vibration or any other reason.

Q. I notice in the model you have in your hand some latch provision provided. Is that provided in the patent or not?

A. No, this rotation provision here within the little segment which protrudes out of the tube here is not part of the patent under discussion. What I am referring to is the fact that this nut is a straight cylindrical nut; it isn't a tapered nut; it isn't like a cone; it is a straight cylindrical nut from ths portion here, which is element No. 21, and therefore since the collar is also cylindrical on the inside, when the collar is shoved down over the nut, it is just one cylinder over another and there is no component force that would cause the collar to ride

(Testimony of Wallace J. S. Johnson.)

up under operation; in fact, gravity is always pulling the collar straight, keeping the nut engaged with the inner leg.

Q. I show you, Mr. Johnson, a scaffold here in the court room and ask if it is fitted with legs of the type described in the patent in suit?

A. Yes, it is.

Mr. Mellin: May I offer that scaffold in evidence?

(Whereupon scaffold referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Mellin: With the Court's permission, may Mr. Johnson [33] approach the scaffold?

The Court: Surely.

Mr. Mellin: Q. Do you have something with you by which you can show the Jury the manner in which this scaffold with the patented legs, adjustments can be ordinarily made?

A. Yes, I do.

Mr. Mellin: Can the Jury see it if it is over here, or would be it better——

The Court: They will have to look over the tops of the box from wherever it is. If the Jury wishes to stand up they may do so.

The Witness: Obviously the condition in this court room, even though this floor is probably slightly off level, it isn't the typical thing encountered in using a scaffold on a street or floor or over curbings or other obstructions. So to illustrate the adjustability of the legs to meet such usual uneven

(Testimony of Wallace J. S. Johnson.)

surfaces, I have just used these three objects, a waste basket and two blocks of wood, to give three different levels other than the level of the floor itself.

In positioning an adjustable scaffold, naturally you would put the retracted leg on the highest object and then extend the others. So in this case, to level the scaffold it is merely necessary to adjust the leg in that manner (indicating). As you can see, the adjustment of the scaffold is accomplished rapidly as far as the coarse adjustment is [34] concerned; and then if it is found that the scaffold is slightly off-level, this fine adjustment can be made by turning one leg, as, for example, this leg seemed to be a little bit high, therefore I made a few turns on it, and it makes the scaffold substantially level.

Q. Thank you, Mr. Johnson. Will you tell us please, Mr. Johnson, when you first produced a scaffold of the type you have just been demonstrating; that is, with legs of that type?

A. To the best of my recollection, it was that I built this, was during August and September of 1946.

Q. Was that a commercial device or otherwise?

A. That was an experimental model which we tried out in October of 1946 to paint my house.

Mr. Mellin: Will you mark these for identification?

Mr. Bronson: For Identification?

Mr. Mellin: Yes.

(Testimony of Wallace J. S. Johnson.)

(Whereupon book containing four photographs was marked Plaintiff's Exhibit No. 9 for Identification only.)

Mr. Mellin: Q. In the scaffold, this demonstrating or experimental device that you built to use for painting your house, did that operate successfully? A. Yes, it did.

The Court: Are you referring to the device that is in the [35] patent in suit?

Mr. Mellin: That is right.

The Court: With adjustable legs?

Mr. Mellin: That is correct, Your Honor.

Mr. Mellin: Q. I hand you a book containing four photographs, and ask you what those photographs depict, please. [36]

* * * * *

The Court: Q. You had a scaffold with the same device on it as Exhibit No. 8?

The Witness: Yes.

The Court: And you first used that when?

The Witness: In October of '46—1946.

The Court: To paint your own house?

The Witness: That is right.

The Court: Did it work all right?

The Witness: Yes.

The Court: Did it work in the way that you have stated that this one works?

The Witness: Yes.

The Court: Is that what you wanted? [37]

Mr. Mellin: I wanted that and I wanted to show the pictures because this is a part of——

(Testimony of Wallace J. S. Johnson.)

Mr. Bronson: He wants the pictures of Mr. Johnson's house and Mr. Johnson in a pair of jumpers. I submit that Your Honor's questions answer it fully.

Mr. Mellin: I submit it does not, Your Honor.

The Court: I will reserve ruling on this. If it is necessary, we will let it in later, but at the moment I think the witness has described what happened. [38]

* * * * *

Mr. Mellin: Q. Mr. Johnson, you named this morning certain requisites that a scaffold must have to be properly operative. Could you state whether or not the scaffold fitted with the legs of the patent would have those requisites?

A. Yes, they do. Yes, it does.

Q. Would you approach the device which you assembled, this Exhibit 8, and explain to the Jury if you will the advantages which this scaffold has with the patented legs?

A. In the first place, you will notice that as you lift the scaffold, or for example as you are working on it, if you tilt the scaffold, the legs do not fall out. And in the old familiar screw jack type of leg in which there merely threaded leg here and the rotating nut here, if you tilt or lift the scaffold or roll it over a hole in the floor, a leg would be apt to fall out. Therefore it would be a very great safety hazard and certainly not usable as a portable ladder. [39]

You will notice that with the leg in any ad-

(Testimony of Wallace J. S. Johnson.)

justed position and with the collar down over the nut, in effect making it a solid nut against the threads of the leg, you have a construction here which essentially is the tubular column or post of the scaffold itself; as the nut is held in position you merely have these two slits in the tube, so as a vertical load-carrying member it is substantially as strong as the structure above.

You will also notice that the upper portion of the leg is unthreaded and that therefore the leg with this unthreaded portion always inside always has a portion of the leg inside of the outer leg, and therefore it holds the leg fast or in a stable manner so that if any force pushes on the side of the scaffold, you do not—if you have a force pushing on the side of the scaffold, such as when a man is rolling it and we come to a dip, or for any other reason, there is no chance of this leg buckling because there is always that unthreaded portion up inside of the other leg, no matter how far you extend the leg, even up to the maximum, 24 inches.

Q. You spoke about it not falling out. Demonstrate why it is impossible for it to fall out, Mr. Johnson.

A. Because the threads of the inner leg are fitted closely with the threads of the nut which is held in position by this locking collar. Therefore it cannot fall out, the nut being a solid part of the tube. [40]

Q. Can the leg be screwed out?

A. Yes, it can, but only to where the threads

(Testimony of Wallace J. S. Johnson.)

end. Therefore, a man could never screw the leg out too far, though he had the threaded portion inside and the nut might be holding by one or two teeth or it might not be holding on and the nut would be merely resting on top of the screw.

And another feature it obviously has is it has a fine adjustment which can be made at any time to take any slight amount of looseness out of the structure or any slight inaccuracy in the coarse adjustment in regards to the slope of the ground or floor. Then the vertical rapid adjustment is obviously incident to any position that you want to make it; you merely move the scaffold to the level desired and then lock that nut again, thereby getting an immediate rapid adjustment to where you want to go.

A final feature that might be mentioned is that now as you roll this scaffold from place to place, moving along on the floor or ground or sidewalk or whatever it was, that this nut turning on the collar here has no tendency to rise up because it is, as shown on the drawing, secured on the cylindrical portion of that nut and therefore there is no force causing it to ride up or vibrate or anything; gravity is always holding it in position. So those are the ways in which this adjustable leg mechanism makes a portable scaffold practicable. [41]

Q. In the manufacture and sale of scaffolds with this leg, have you sold or offered these legs separate from the scaffold as such?

A. No, they are never sold separately.

(Testimony of Wallace J. S. Johnson.)

Q. Would that be a practical thing or not?

A. No, because it is a built-in feature, a part of the scaffold itself.

Q. I show you an end frame of a scaffold with adjustable legs on it, Mr. Johnson, and ask you if you will tell us what it is, please?

A. That is an end frame of a scaffold manufactured by the defendant in this case.

Q. Did you procure just this part or the whole scaffold?

A. No; we bought the entire scaffold through another concern. That is practically identical to the scaffold erected there.

Q. When was that bought, Mr. Johnson?

A. I think there is a definite record on that. To the best of my recollection, it was in late November or early December of 1952.

Q. Was it prior to the issuance of the patent in suit, which was November 18, 1952, or subsequent to it?

A. We purchased it a little after the issuance of the patent in suit.

Q. You are familiar with the construction and operation of this device? [42]

A. Yes. That is simply one of the two frames that went with the scaffold, and it also had a platform and braces as do the other.

Q. Approaching the scaffold, would you show the Court and Jury the construction of the legs and the manner of its operation?

A. The same collar surrounds the nut so that

(Testimony of Wallace J. S. Johnson.)

when the leg in the scaffold is raised you get the same type of adjustment.

Q. Will you show us the similarities, if any, and the differences, if any, between that and the device that was shown in the patent in suit?

A. It is the same device and works in the same manner.

Q. Is there any difference at all, Mr. Johnson?

A. Well, to the best of my knowledge, there are three. This slot in the tube here is slightly shorter than this tube.

Q. Would that in any fashion or not change the function or mode of operation of the device?

A. It has no relationship to the function or mode of operation.

Q. And the next?

A. This little button here is a different means, providing a little accessory latch arrangement than the one that was described before; but in neither case is that a part of the patent mechanism at issue, but that is a difference in these [43] two devices.

The third difference that I have been able to observe is the fact that this nut here has a shoulder on it, whereas the plaintiff's device does not have a shoulder on it.

Q. What change, if any, does that make in the function or mode of operation of the device?

A. None.

Mr. Mellin: May I offer that in evidence, Your Honor, as the next exhibit?

(Testimony of Wallace J. S. Johnson.)

(Whereupon end frame of scaffold, heretofore referred to and more particularly described, was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Mellin: Mark this for Identification.

(Whereupon an enlarged chart, more particularly described hereinafter, was marked Plaintiff's Exhibit No. 11 for Identification Only.)

Mr. Mellin: Q. I show you a chart, Mr. Johnson, and ask you if you are familiar with it?

A. Yes.

Q. Would you tell us what that chart depicts, Mr. Johnson, please?

A. The chart shows three adjustable legs: Figure 1, Figure 2 and Figure 3. The upper view shows the leg unlocked, and the lower view in each case shows the leg locked or the [44] nut retracted into the threads of the inner leg.

The first figure shows the device as it was drawn in the patent drawing, the patent that was issued, the one that is under discussion here.

The second figure shows the device as commercially manufactured now by Up-Right and which is shown in the exhibit of the scaffold on the floor.

And the third shows the device as manufactured and as we purchased the device entered in the most recent exhibit manufactured by the defendant.

Q. Does that drawing accurately show all the three devices you have spoken of? [45]

* * * * *

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: Q. Would you compare the devices shown in figures 1 and 3 and tell us the similarities, if any, and the differences, if any, between the two adjustable scaffold legs shown on that chart, Exhibit No. 11 for Identification?

Mr. Mellin: May I interpose there and offer that in evidence on the testimony of the witness that it is accurate?

The Court: All right; it may be admitted.

(Whereupon Plaintiff's Exhibit No. 11, previously marked for Identification Only, was received and marked in evidence.) [47]

* * * * *

Mr. Mellin: Q. Would you compare Figures 1 and 3, if you will, showing the similarities, if any, between the construction of the two and the mode of operation of the two. As I understand your testimony, Figure 1 shows the device as shown in the patent in suit, Exhibit 1? A. Yes.

Q. And Figure 3 shows the defendant's accused device?

A. That is right. Figure 1 shows in light green color a tubular leg or column of a scaffold. The same light green color shows the same type of tubular leg column of a scaffold in Figure 3. On the end of that light green colored tube is fixedly attached a nut, a segmented nut, No. 21 in the patented device. The same nut, No. 21, is shown fixedly attached to the tube in the defendant's device as shown in this drawing.

The collar shown in red, No. 24, that slides up

(Testimony of Wallace J. S. Johnson.)

and down and presses the segments of the nut, is shown in Figure 1 on the patented device; and the same collar with the same color and with the same number is shown to function in the identical manner in the defendant's device.

The blue unthreaded portion of the leg, inner leg, is shown in both Figure 1 and Figure 3 as a part of that inner [48] leg and to have the same function in both cases.

The yellow threaded portion No. 17(a) in both Figure 1 and Figure 3 is shown to function in the same manner.

Q. And what differences, if any, are there between the devices in construction?

The Court: Hasn't he already testified to that?

Mr. Mellin: Yes, Your Honor.

The Court: I think he already answered that, didn't he?

Mr. Mellin: All right.

The Court: He has pointed out three differences.

* * * * *

Am I correct about that?

Mr. Mellin: That is correct, Your Honor.

The Court: That is the reason why I am admitting them. They may be further explanatory of the physical devices.

Mr. Mellin: That is correct, Your Honor.

The Court: I am not so sure that they are, but that is [49] what patent lawyers always like to do; they always want to put documents in. You can see

(Testimony of Wallace J. S. Johnson.)

the thing much better than you can from the diagram. But the Jury is not bound by my statement in that regard; you draw your own conclusions.

Mr. Mellin: Q. Now, Mr. Johnson, comparing the two devices that we have—that is Exhibit 8 and Exhibit 10—would you compare the inner legs for us of the two devices precisely and show whether or not they have any precise characteristics as far as dimensions or physical appearance is concerned.

Mr. Bronson: As I understand this, if the Court please, it is merely a repetition of something that has already been shown. Am I right in that?

Mr. Mellon: No; you are confused there, Mr. Bronson.

Mr. Bronson: All right, I will withdraw it.

Mr. Mellin: It will only take a second, Your Honor. I want to show that the inner legs are precisely alike, not only in function.

Mr. Mellin: What leg is that you have there?

A. This leg is the leg from the device as manufactured and patented by Up-Right.

Q. In your left hand——

The Court: You had better give it a separate number because sometime or other it may be necessary to refer to it.

Mr. Mellin: Will you make that 10-A? [50]

The Court: Mark that 10-A, Mr. Clerk, so that we won't be confused about it.

(Whereupon leg referred to and more particularly described above was marked Plaintiff's Exhibit No. 10-A in evidence.)

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: And the leg of the Up-Right scaffold, will you make that 8-A?

The Court: That is right.

(Whereupon leg referred to above and more particularly described was marked Plaintiff's Exhibit No. 8-A in evidence.)

Mr. Mellin: Which one is which?

The Witness: This is the leg that is manufactured and patented by Up-Right.

Q. That is 8-A? A. Yes.

The Court: You had better mark it now.

Mr. Mellin: And this is 10-A the accused device.

Mr. Mellin: Q. Now, would you compare the diameter and the other physical characteristics of the two devices 10-A and 8-A?

A. Within a fraction of an inch, the two devices are identical. The unthreaded portions also within a fraction of an inch are the same length, and the threaded portion of each leg is within a fraction of an inch of the same length. [51]

Q. In Exhibit 8-A, which is the Up-Right leg, does that have the standard thread?

A. No, it has a thread which is particularly designed for this scaffold.

Q. How does that thread compare with the thread in 10-A, the accused device?

A. For all practical purposes, it is identical, because the two are interchangeable. [52]

Q. Will you show us that please? What leg do you have in your hand?

A. The defendant's leg. (Demonstrating.)

(Testimony of Wallace J. S. Johnson.)

Q. Thank you, Mr. Johnson. For how long has Up-Right been manufacturing a scaffold of that identical construction, Mr. Johnson?

A. Since February 28, 1947 when we delivered the first four scaffolds.

Q. Bearing in mind that the patent in suit, that is Exhibit 1, was applied for in September of 1947 and issued in November of 1952, having those dates in mind, when was it that you first discovered that the defendant was employing the adjustable leg such as you have demonstrated in Exhibit 8?

A. It was in November of—let's see, November of 1951, I believe it was.

Q. And were you familiar with the type of leg that the defendant was using in their portable scaffold prior to that time? A. Yes.

Q. I show you a device and ask you if you can identify it. If you can, tell us what it is.

A. The portion of it that I have in my left hand is a leg manufactured by the defendant prior to their changing to their present construction.

Q. By their present construction, you are referring to the [53] legs of Exhibit 10?

A. Yes. This outer tube happens to be just a tube from our factory, but it works in exactly the same manner because it was the leg on the scaffold from which this leg came.

Mr. Mellin: May I offer that assembly in evidence as illustrating the witness' testimony as the next in order?

The Court: Very well.

(Testimony of Wallace J. S. Johnson.)

(Thereupon leg from defendant's prior device was received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Mellin: Q. From Plaintiff's Exhibit 12 which you have in your hand, would you please show the Court and jury how it is adjusted for height, if you can?

A. The nut, which is this portion here, was turned on the threaded leg to adjust the height of the scaffold up and down. This is what is conventionally known in the trade as just a simple screw jack; a threaded leg and a nut inserted in the lower end of the tubular section. By turning the nut screws up and down on that threaded leg.

Q. Is that or is that not the only means of adjusting that threaded leg?

A. That is the only means of adjusting, is screwing the nut up and down on the threaded inner leg.

Q. You said a while ago, in connection with one of the scaffolds, that the leg would fall out when it went over a [54] hole or the scaffold was elevated too high. Could you show the jury and the Court what you meant by that?

A. Well, if this is the scaffold, that is what happens, it falls out (demonstrating).

Q. Prior to the time when you first observed the defendant putting out the adjustable legs of Exhibit 8 had you advertised the plaintiff's scaffold with legs such as in Exhibit 8?

A. Yes, we have advertised it extensively ever since we started in 1947.

(Testimony of Wallace J. S. Johnson.)

Q. Since '47? A. Yes, 1947.

Q. And would those advertisements or would they not teach you the fact of this leg adjustment?

A. Yes, we have featured the leg adjustment in our advertisements.

Q. Over what area was that advertising conducted and in what media?

A. In national trade magazines circulated throughout the United States and in many foreign countries.

Q. I show you what purports to be an advertisement in the American Painter and Decorator magazine of April 1951, and ask you if that is an advertisement of Up-Right, Inc. of this scaffold, Exhibit 8? A. Yes.

Q. And would you state whether or not that is typical of [55] the advertisements that you referred to? A. Yes.

Mr. Mellin: I will offer that in evidence, Your Honor, as next in order.

(Thereupon advertisement referred to above was received in evidence and marked Plaintiff's Exhibit No. 13.)

[See Book of Exhibits.]

Mr. Mellin: May I hand that to the jury, Your Honor?

The Court: Very well.

(Exhibit No. 13 was thereupon passed to the jury.)

Mr. Mellin: Q. Mr. Johnson, did Up-Right

(Testimony of Wallace J. S. Johnson.)

Scaffolding put out any brochures depicting the device of Exhibit 8?

A. Yes, we have had printed literature ever since we started manufacturing.

Q. And would you tell us whether or not in those brochures you illustrated this adjustable leg feature that is shown in the patent in suit?

A. Yes, it has been featured in all of our advertisements and leaflets.

Q. And since what time?

A. Since we started manufacturing in 1947.

Q. I hand you a brochure entitled "Up-Right Scaffolds" and ask you if that is typical of the manner in which that feature of the scaffold was depicted in your brochures over the period from 1947 to December of 1953? [56]

A. Yes, it is.

Mr. Mellin: May I offer that in evidence, Your Honor, as the next in order?

(Thereupon brochure identified above was received in evidence and marked Plaintiff's Exhibit No. 14.)

[See Book of Exhibits.]

Mr. Mellin: Q. Over what territory or to whom were brochures such as Exhibit 14 distributed?

A. They were distributed in all parts of the United States, in fact, every state in the Union.

Mr. Mellin: May I pass it to the jury?

(Thereupon Exhibit No. 14 was passed to the jury.)

Mr. Mellin: Q. Prior to the time that you ob-

(Testimony of Wallace J. S. Johnson.)

served that the defendant was using this adjustable leg feature shown in Exhibit 10, had you observed any of the defendant's advertisements with respect to the type of adjustable leg they were employing?

A. Yes.

Q. I hand you two tear pages, tear sheets, one of Industrial Equipment News and one of Contractor's Electrical Equipment, one of May 1950 and one of June 1950, and ask you if there appears thereon an advertisement of the defendant?

A. Yes, there does in each case.

Q. And can you tell from that advertisement the type of adjustable legs that were on those scaffolds? [57]

Mr. Bronson: I think the thing is the best evidence of its contents; it doesn't need explanation. We will object to asking the witness Johnson to interpret what is said.

The Court: I think your objection is good.

Mr. Mellin: Q. Does that show the Patent Scaffolding——

The Court: If you want to read it, you can read it.

Mr. Bronson: I would like to have him read it. It doesn't say anything about it.

Mr. Mellin: It depicts it in the illustration.

Mr. Bronson: There is a picture there. The jury can look at a picture just as well as Mr. Johnson, who is a party to this action.

The Court: There are pictures of scaffolds here, Mr. Mellin.

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: Yes, that is right.

The Court: They are not very clear. I don't know how you can tell from looking at them. Maybe you can.

Mr. Mellin: That is all right. Thank you, sir. May I offer those in evidence as the next in order?

(Thereupon tear sheets identified above were received in evidence and marked Plaintiff's Exhibit No. 15.)

[See Book of Exhibits.]

Mr. Bronson: I read them rapidly, Your Honor. Maybe counsel would concede that there isn't any reference or description of adjustments on those adjustable legs on those; [58] at least not with any particularity.

Mr. Mellin: I think one who is familiar with scaffolds can tell from the type of scaffold illustrated that there is an adjustment. I think that was proper, but he objected to it, so I am just putting them in so the jury can draw their own conclusions from looking at them.

The Court: All right; let them be admitted.

Mr. Mellin: Q. I hand you a brochure of the defendant, Mr. Johnson, which has a copyright date of 1950 and ask you if you obtained that about the date, some time during that year, or not?

A. Yes, we did.

Q. And does that illustrate the defendant's scaffold made about that time, to your knowledge?

A. Yes.

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: I offer that in evidence, Your Honor, as the next in order.

(Thereupon defendant's brochure identified above was received in evidence and marked Plaintiff's Exhibit No. 16.)

[See Book of Exhibits.]

Mr. Mellin: Q. I hand you a brochure of the Patent Scaffolding Company, bulletin ASF-1, which bears the copyright date 5/52, and ask you if you are familiar with the scaffold therein shown?

A. Yes, I am. [59]

Q. And does that illustrate Exhibit 10 as far as the adjustable leg feature is concerned?

A. Yes.

Q. When was it that you first saw a brochure or advertisement of the Patent Scaffolding Company illustrating or describing such a leg?

A. During the year 1952.

Q. And by the pamphlet you have in your hand or not?

A. That and others of the same vintage.

Mr. Mellin: May I offer that in evidence, Your Honor, as the next in order?

The Court: All right.

(Thereupon the brochure of the Patent Scaffolding Company referred to above was received in evidence and marked Plaintiff's Exhibit No. 17.)

[See Book of Exhibits.]

Mr. Mellin: May I hand these to the jury, Your Honor?

(Testimony of Wallace J. S. Johnson.)

(Thereupon exhibits were passed to the jury.)

Mr. Mellin: Q. When did you yourself first see a scaffold put out by the defendant that is comparable to Exhibit 10?

A. I believe it was in January of 1952 at the Plant Maintenance Show.

Q. Where was that?

A. I believe it was in Cleveland.

Q. Prior to that time at shows, fairs, or any other places [60] had you observed the defendant's portable scaffolding? A. Yes.

Q. And prior to that 1952 incident that you speak of, with what type of adjusting legs were the defendant's devices equipped?

A. Well, Mr. Mellin, for example on one particular occasion in September of 1950 I observed here in San Francisco the type of leg shown in this Exhibit No. 12.

Q. At any time were there any competitive demonstrations made between the Plaintiff's scaffolding and the Defendant's scaffolding?

A. Yes; for example, in the instance I mentioned in September of 1950 I was present at a comparative demonstration of Up-Right scaffolds and of Patent Scaffolding Company's scaffolds before the officials of the Department of Public Works of San Francisco.

Q. And what type of scaffold adjusting legs did the Up-Right scaffolds have?

A. Up-Right scaffold?

Q. Yes.

(Testimony of Wallace J. S. Johnson.)

A. It had the type shown in the patent drawing.

Q. In other words, Exhibit 8?

A. In Exhibit 8, yes.

Q. What type of adjusting legs did the defendant's device have? [61]

A. The defendant's device had this type of legs shown in Exhibit 12.

Q. During your experience in the mechanical engineering field and in the production field that you referred to, would you state whether or not you had any experience in connection with the licensing of patents?

A. Yes. In Autometric Machine Tool Company, for example, I was in charge of engineering, and that included the discussing and analyzing of license agreements, not only with one invention in which there was an actual license agreement, but others who came to us with devices they wished to put into manufacture.

Also at Joshua Hendy Iron Works when I was in charge of development of post-war products there, I negotiated a number of agreements with individual inventors. One was an oil well pump, another a rock crusher, and another was, let's say, a complete system for the generating of steam with a man named Benson. So in both of those cases I had experience in license agreements and arranged them.

Q. What importance, if any, would you place on the adjustable feature of this scaffold with respect

(Testimony of Wallace J. S. Johnson.)
to the salability and the usability of the scaffold Exhibit 8?

A. I would say that it is of prime importance because it is the feature that made the portable scaffold idea practical.

Q. From your knowledge of the scaffold art and from your [62] prior experience in connection with licensing, what would you say, in your opinion, would be a reasonable royalty for one to pay, for a manufacturer to pay for the use of this adjustable feature on a scaffold of this character?

A. Five per cent of the sales value of the scaffolds.

Q. When a scaffold includes more than one unit, that is, more than one of those sections, do you separately bid the section or do you bid the scaffold as the complete thing?

A. We manufacture, sell and bid scaffolds as complete entities themselves, not as parts.

Mr. Mellin: If Your Honor please, if we may have a five minute recess maybe Mr. Bronson and I could agree on a stipulation.

Mr. Bronson: You don't need to do that, if we might look at it.

(Discussion between counsel.)

Mr. Mellin: That will be all, from this witness. You may cross-examine.

Cross-Examination

Mr. Bronson: Q. I am referring you, Mr. Johnson, to your Exhibit 2, and I want to read a por-

(Testimony of Wallace J. S. Johnson.)

tion of it. That, to identify it to the Court and jury, is the agreement that you made with Up-Right Scaffolding Company dated January 5, 1948. It says: [63]

> "This agreement made and entered into as of January 5, 1948 by and between Wallace J. S. Johnson of Berkeley, California, hereinafter referred to as Engineer, and Up-Right, Inc., a corporation authorized by and existing under the laws of the State of California, and having its principal place of business in the City of Berkeley,——"

and so forth.

> "Witness:
>
> "Whereas, Engineer Warrants that he is the inventor of the portable scaffold and scaffold mechanism described in patent applications to the U. S. Patent Office Serial No. 678,790, filed June 24, 1946, Portable and Collapsible Scaffolding Unit. Serial No. 774,036, filed September 15, 1947, Adjustable Supporting Leg. Serial No. 774,037, filed September 15, 1947, Stairway and Like Structure and Method of Fabricating the Same. Serial No. 774,038, filed September 15, 1947, Portable Scaffold Unit."

I am not reading the rest, because I only intend to direct briefly your attention to that portion of the agreement. Each of those described applications for patents were then pending in the Patent Office in Washington, that is, on January 5, 1948, were they? [64] A. Yes.

(Testimony of Wallace J. S. Johnson.)

Q. Where I read after the date in each case the language "Portable and collapsible scaffolding unit" in the case of one application; "Adjustable supporting leg" in connection with another; "stairway and like structure and method of fabricating the same" for the third one; "portable scaffold unit" for the fourth one—those were all separate patents on the separate features of your scaffold, were they not?

A. They were separate applications, yes.

Q. And only one of them, to wit, the one I read as No. 774,036, filed September 15, '47, followed by the words "Adjustable supporting leg" refers to the patent that is in suit here; is that right?

A. Yes.

Q. So that to this Corporation by this agreement you transferred certain rights that we call in this case an exclusive license to the corporation; right? A. Yes.

Q. And you gave them it for the life of the patent in each case that might be issued; is that right? A. That is right.

Q. And you took as a sole consideration for the transfer of the patent that is in this suit and the four other applications for patents the amounts set forth in Paragraph 2 as follows: [65]

> "Company agrees that effective January 1, 1948 it will pay Engineer a royalty of $200 a month throughout the term of this agreement. This amount shall be paid not later than the 5th day of the month following each month end."

(Testimony of Wallace J. S. Johnson.)

That is right, is it not?

A. No, that isn't the sole reward.

Q. Well, it is the sole reward that is referred to in the agreement by which you transferred all of those conceptions whether they be inventions or not to this corporation? I will hand you the agreement; you can look at it and see if you can find any other consideration recited in there that went to you for those four patent applications.

A. There is no other consideration specifically referred to in this agreement.

Q. There are other stockholders in that company besides yourself?

A. Yes, there are a few other minor stockholders.

Q. You are a stockholder, are you?

A. I am the principal stockholder.

Q. You refer to serial number 774,036 as one of the—I will point to it there. How do you describe what you claimed was the invention at that time in that instance? What does it say there after 774,036?

A. "Filed September 15, 1947, Adjustable Supporting Leg." [66]

Q. You sued unsuccessfully this same defendant on that patent when it was issued, did you not?

Mr. Mellin: I object to that, Your Honor.

Mr. Bronson: We couldn't go into this further on the question of commercial success, so-called.

Mr. Mellin: "Sued unsuccessfully"—I am not so certain that is correct.

(Testimony of Wallace J. S. Johnson.)

Mr. Bronson: I will take out the word "unsuccessfully".

Q. You did sue this company that I defend here, the Patent Scaffolding Company, on one of these four rather than the one you are in suit on now, did you not?

A. Yes, but not the one that I had read, not the adjustable supporting leg; it was one of the others.

Q. I understand that. What is the one on there that you sued on before?

A. The one referred to as "portable and collapsible scaffolding unit."

Q. Do you recall how long ago you were in court on that suit? A. Three years ago.

Q. And didn't you claim commercial success then and the fact that that particular device then in suit, portable and collapsible scaffolding as it then existed without the adjustable leg was the basis of the commercial success?

A. I don't recall that we said that it was the sole basis for commercial success, no. [67]

Q. Do you state now to this Jury that the sole basis for commercial success of your entire scaffold as you now manufacture it is this leg?

A. I didn't state that; I stated that it was of prime importance in making the portable scaffold idea practical.

Q. You heard your Counsel address the Jury this morning in respect to the damages you claim here, basing it on the entire cost of the scaffolding

(Testimony of Wallace J. S. Johnson.)

as a basis for applying a royalty formula; is that right?

A. I think the record will show what he said, but to the best of my recollection, he mentioned that substantially as you have stated it.

Q. Mr. Johnson, when you testified here not five minutes ago about what you did down there at Hendy as a man negotiating with patentees on behalf of that Corporation, you then being their employee, you based that experience on a statement here that your royalty formula should be applied to the entire cost of the scaffolding, legs, platforms, ladders and all; is that right?

A. I don't believe I made a statement like that. I would say in explanation that in the case of a structure where the device under construction is an integral part of the device, the only practical arrangement for a royalty is upon the entire device itself, where as in the case of a device which is in commercial usage and otherwise easily disassociated from [68] the product, in that case the royalty can be upon the individual device itself.

Q. You don't mean that a painter can't work up there without your leg underneath him on this type of scaffold?

A. No, because it is a built-in, integral part of the scaffold; if it was left off he would fall down.

Q. You stated your age as forty-one. Do you remember the first time steel scaffolds were used on the outside of buildings or inside of buildings, demountable scaffolds?

(Testimony of Wallace J. S. Johnson.)

A. I have observed steel scaffolds in use all my adult life, yes.

Q. You filed the application back in Washington for this patent on what date, did you state?

A. I believe it was September 15, 1947, although the exhibit would show that date.

Q. Well, I have it here now. On the face of the application it shows the application was filed September 15, 1947; is that right?

A. That is correct.

Q. Will you tell the jurors how many claims of invention you made on that first application?

A. To the best of my recollection there were about eleven drawn up by our patent attorney.

Q. And all eleven of them were rejected; that is true, is it not? [69]

* * * * *

Mr. Bronson: Q. I wanted to straighten out one thing here, Mr. Johnson. Exhibit 16 I believe was passed to the Jury—Patent Scaffolding Company brochure your Counsel called it—that doesn't show, does it, in any of the drawings there the use of this type of leg?

Mr. Mellin: "This type", referring to which one?

Mr. Bronson: I pointed; I am sorry—to the patent [72] in suit and the type of leg represented by the patent in suit.

The Witness: This circular with the date on it of 8/50—1950—it says on here, does not show the type of leg in suit today, no.

Mr. Bronson: Q. You stated the date of your

(Testimony of Wallace J. S. Johnson.)

application for the patent in suit was in September 1947, and the Letters of Patent which have been put in evidence first by your Counsel show that the patent was issued slightly over five years later on November 18, 1952. You are not claiming here, if you can clarify this for me, that there was infringement by the defendant prior to the time you got the patent from the Patent Office?

Mr. Mellin: Your Honor, I object to that. Naturally there can be no infringement before the date the patent issued. That is a matter of law. There couldn't be. We showed that prior history to show that the patented device was on the market, they used and they continued to use it after the patent in suit was issued. We are claiming to recover only from the date of issuance of the patent—In fact, from the date of the first filing of the complaint. As a matter of law, there can't be any claim; we have no patent before that period.

Mr. Bronson: That is fine. We will accept that as a statement of your position and the question need not be answered. I didn't understand why you went into the two or [73] three years prior to the issuance of the patent.

Mr. Bronson: Q. Mr. Johnson, you know that the Government, as one customer for a rolling type of scaffolding, was specifying an adjustable leg of the kind represented by the patent in suit before you had any patent; isn't that true?

A. I don't understand whom you mean by "the Government"?

(Testimony of Wallace J. S. Johnson.)

Q. Any department of the Government—the Army, the Navy, or anybody concerned with construction particularly; well, in any field. Do you know that?

A. I am not sure I understand the question. I understand that the Government has various departments that are concerned with construction, yes.

Q. Let me ask you this: Have you ever sold to the Government? A. Yes.

Q. Have you sold to the Government scaffolding with this adjustable leg before the time that the letters of patent were issued? A. Yes.

Q. And do you know that those purchases were specifying a type of leg of this kind in their specifications and invitations for bids prior to the time that your patent was issued?

A. Yes, I do.

Q. And some of those bids were fulfilled or filled by your company and some by other companies; isn't that true?

A. I am familiar with the ones that we filled ourselves, yes. [74]

Q. You know that some of them you didn't get; they went to someone else; is that true?

A. During what period?

Q. Up to the time that your letters patent, but not beyond the time your letters patent were issued.

A. Yes, there were some that went to other vendors prior to the issuance of the patent.

Q. On the matter that I questioned you about

(Testimony of Wallace J. S. Johnson.)

before lunch, I will hand you this patent No. 2,438,173; I don't have the original, but a photostatic copy. This represents the W. J. S. Johnson Patent that was in suit some three years ago, on which you sued the same defendant as is here now; is that correct?

A. Will you repeat the question, please? It was rather long.

Q. Isn't that the patent that was in suit three years ago when you sued the Patent Scaffolding Company? A. Yes.

Q. And it does represent an aluminum scaffold?

A. Yes, portable scaffold.

Q. A portable scaffold, but without casters; right? A. Yes.

Q. It is portable by picking it up, lifting it, not by rolling it; is that correct?

A. That is right. [75]

Mr. Bronson: I will ask that that go in evidence. I don't propose at this time to hand it to the Jury.

Mr. Mellin: It is already in evidence.

Mr. Bronson: 2,438,173?

Mr. Mellin: Exhibit 5.

Mr. Bronson: I will withdraw that offer.

Mr. Bronson: Q. Mr. Johnson, I will hand you what purports to be an advertisement of Up-Right Scaffolding. I wish you would look at it and tell us if that is an ad placed by your Company in some trade journal?

A. Yes, this is an advertisement of our Company.

(Testimony of Wallace J. S. Johnson.)

Q. It bears the date down there, not on the ad, but the date November 1953. Were you placing ads of that kind or that particular one at that date?

A. 1953?

Q. Yes. A. Yes, that type of ad, yes.

Q. Do you recognize that as one that you placed in a trade journal in the latter part of 1953?

A. I don't remember the exact time, but, yes, that is our ad.

Mr. Bronson: I will ask that this be admitted, Your Honor.

(Whereupon advertisement dated November 1953, referred to and described above, was received [76] in evidence and marked Defendant's Exhibit A.)

Mr. Bronson: To save the time of passing this to the Jury, I want to read it, Your Honor. I can't read the pictures, Your Honor, but I can read the printed part, which I will do now.

It shows a figure of a magician with a wand and it says:

"Presto * * * it's up!"

Then:

"25 feet. 'Up-Right'. Scaffold-on-wheels set up in only five minutes! As if by magic, an aluminum alloy tower of height desired is ready in minutes! Individual scaffold sections are set one on top of the other. Sections lock into place instantly. The tower rolls down aisles—straddles machinery.

"Here's the secret! Patented one-piece sec-

(Testimony of Wallace J. S. Johnson.)

tions. Each one-piece section is unfolded by one man in less than a minute! No tools, winged nuts or bolts.

"Your maintenance costs can be reduced by 'Up-Right Scaffolds.' Offices in all principal cities. Write for descriptive circular. 'Up-Right Scaffolds'"

with an address on Pardee Street, Berkeley, and the expression:

"Factories: Berkeley, California and Teterboro, New Jersey." [77]

Mr. Bronson: Q. Do you have a hand in writing up these ads? A. Yes.

Q. When you wrote this one up and spoke of the one-piece sections, you were at that time manufacturing this collapsable leg, weren't you, or extensible leg?

A. We were at that time manufacturing the adjustable leg under suit here.

Q. Now I may have misunderstood your testimony on the direct examination conducted by your Counsel, Mr. Johnson, but do I understand you to say that this leg of yours—I don't mean your leg, but the leg of the scaffold—that that cannot fall out; that is to say, the inner member cannot fall out of the tubular member?

A. As long as the nut is held in place by the collar the leg cannot fall out.

Q. Well, if I release that it does fall down, no question about that (demonstrating)?

A. That is right.

(Testimony of Wallace J. S. Johnson.)

Q. You are not claiming for the device anything that will prevent the falling out of the inner member with the relaxation of the clutch device; that is, the sliding out of the collar to the point where the fingers are extended outward?

A. When the collar is raised and the nut expands, the leg seeks its own level and provides the very coarse adjustment feature, which is what we were achieving when I invented it. [78] Another way of saying it falls, just like you demonstrated.

Q. I want to clear that up. You are not contending that you have got any device whereby once you release that collar this inner portion may not drop out of the outer portion?

A. We are specifically contending that when you do raise the collar and the nut opens, that falling action is the coarse adjustment built into the mechanism. In that sense it does fall, yes, but only in that sense.

Q. One other point I would like to bring out before going further. You stated that the collar remains in place despite the fact that the scaffold may be rolled around over uneven surfaces because the threaded nut at the bottom on the outer shaft is exactly cylindrical, not tapered, and that the collar itself is exactly cylindrical, and not tapered; is that correct?

A. That is correct, in the sense that when the collar is surrounding the nut, the nut is held in a cylindrical relationship within the cylindrical collar, yes.

(Testimony of Wallace J. S. Johnson.)

Q. Yes. All right. Your answer then is "yes" and you stated, to go further with it, that gravity kept it down, is that right?

In other words, the force of gravity that goes toward the center of the earth holds down this collar on the outer shaft when it is locked because there are perfectly perpendicular surfaces to both the collar and the outer shaft? [79]

A. Yes, gravity pulls down on the collar, yes.

Q. What is this little thing here?

A. That is the gliding latch.

Q. That is the gliding latch. I will carry it down here. The part that you refer to is a portion of the tube that is cut on two sides from the end and raised slightly so that when it is not depressed, it holds the collar from moving back up; is that right?

A. Yes, that's right.

Q. And if you want to move the collar back up, you depress that and you can force the collar forward with your hand manually past that lock; correct? A. Past that latch, yes.

Q. Yes. I will come down here to this little point here. (Indicating) That is the latch that he speaks of that you depress manually and pull the collar up over that roller end so that you can get your rough adjustment, as you call it, or your rapid adjustment; correct?

A. I am not sure I understand the question, but——

Q. Let's not go further with it now. Let me ask you, on this drawing your Counsel introduced as an

(Testimony of Wallace J. S. Johnson.)

enlargement of the drawing submitted to the patent office, do you find that on there at all?

A. What? The latch?

Q. The latch. [80]

A. No, the latch isn't there on that drawing or we are not concerned with it in this suit, to the best of my knowledge.

Q. In any event, what you contend was an invention of yours was one without this latch, sir; correct? A. Correct.

Q. It was added afterward, wasn't it?

A. Oh, yes.

Q. You had a number of accidents from the collapsing of these devices, did you not, when this thing would slip up without a latch to hold it there?

A. Not to my knowledge.

Q. Are you serious about that?

A. I don't understand your question.

Q. You have had your device, your leg as represented on the patent without that latch, collapse and injure people, have you not, and you have had some claims that were made and defended by your insurance company?

A. For a matter of the record, there has been no case in which the construction or design of a scaffold has been found in any lawsuit whatsoever to be at fault. In the only case that ever came to trial the case against us was dismissed because it was proved to be workman error.

Q. It was settled, wasn't it, for many thousand dollars? Wasn't that the St. Paul Mercury case?

(Testimony of Wallace J. S. Johnson.)

A. I am referring to the Sunset Rubber Company vs. Up-Right Scaffold.

Q. I am talking about the one where you had a collapse and did settle on the basis that you had an unsafe condition about that latch.

A. We as a manufacturer and the ones that broke the scaffold have never acknowledged to anyone, nor have the courts ever decided that we were at fault. We have never acknowledged any accident as a fault of design or construction of the scaffold. Now if there was an insurance company who in some case decided they would throw something out of court, that was entirely the decision of the insurance company and not ourselves.

Q. You are like the man who goes down the road through a red light and says "It still wasn't my fault," Mr. Johnson.

A. I don't understand the pertinency of the question.

Q. I don't expect you to admit the fault, but you do know, do you not, a substantial money settlement was made in that case on account of the thing that I mentioned there to you?

A. It was my desire to defend that suit because I felt that we had substantial evidence to show that it was workman error that caused that accident. It was the independent decision on the part of the insurance company, for reasons I don't know, to settle it out of court.

Q. I see. Thank you very much. [82]

You are familiar with the claims of the patent in

(Testimony of Wallace J. S. Johnson.)

suit number 2,618,496 that are contained at the close of the letters?

A. I am familiar with the claim, yes. There is one.

Q. There is one. You are also familiar with the fact that it is made up of four separate elements by its terms, is that not true?

A. Well, I haven't thought of it as being made up of elements, but I am thoroughly familiar with the claim.

Q. Let's read it. We will read it preliminary to some questions I want to ask you. I am eliminating, if the Court please and members of the jury, the opening portion regarding the explanation of the device and its objects. Beginning on line 18 in column 4:

> "Having thus described my invention, what I claim and desire to secure by Letters Patent is:
>
> "A scaffold supporting leg comprising a vertical tubular out supporting leg member terminating at its lower end in a plurality of downwardly extending outwardly radially biased resilient fingers integral therewith,"——

that is the first portion, and I am going to stop there.

Now to indicate the portion that I have just read, what I have called the first element of your claim, take this in your hand, please. What is this "a scaffold supporting leg comprising a vertical tubular outer supporting leg member," [83] you have in

(Testimony of Wallace J. S. Johnson.)

your hands, do you not, a cut-off piece of the tubular outer supporting leg member, have you not? A. Yes.

Q. Going on: "terminating at its lower end in a plurality of downward extending outwardly radially biased resilient fingers integral therewith." That is kind of a mouthful, but what it means, Mr. Johnson, the second portion of it I will say, is the portion here that is slotted and has the outwardly radiating fingers; is that correct?

A. That is right.

Q. In my rough lawyer's language; I am not an engineer. So now we will go to the next portion, and this I will call the second element of your claim:

> "* * * an inner member telescopically received within the outer member, said inner member having an upper cylindrical bearing portion engaging a complementary portion of said outer supporting leg member and having an externally threaded lower portion,"——

leaving out the wheel and all.

That is the portion of the other part of the device here Exhibit 7, is it not?

A. The portion you have in your hand is the inner leg with the cylindrical portion above and the threaded portion below, as you have read in the patent claim, yes.

Q. Now, we come to what I will call the third claim. All of [84] these things follow one upon the other with never more than a comma:

(Testimony of Wallace J. S. Johnson.)

> "* * * a segmental internally threaded nut fixedly secured to said fingers for threaded engagement with the threaded portion of the inner member when the fingers are forced inwardly,"——

what is that?

A. That is this nut which is a part of the tube.

Q. And the internal threads are here?

A. That is right.

Q. And the last element, as I will call it, the collar—where is the collar again?

A. That is this member which slides up and down on the tube when you move it.

Q. I will read it so that we have the complete claim read to the jury:

> "* * * and a collar on the outer member movable relative to the nut to force the fingers inwardly to place the nut into threaded engagement with the threads of the inner member and to retain such engagement until the collar is moved relative to the nut to permit the fingers to move outwardly, the length of the threaded portion on the inner member being substantially greater than the length of the threaded portion of the nut." [85]

This is the collar, is it not, that you move upward or downward to release or to clutch this outer tube against the inner member; correct?

A. That is right.

Q. And the comparison of the length of the threaded members refers to this comparatively

(Testimony of Wallace J. S. Johnson.)
small threaded portion on the outer member with the long threaded portion on the inner; is that correct? A. Correct.

Q. Let me ask you, Mr. Johnson, do you claim to be the inventor of the portion of the device where two members cooperate, telescopically?

Mr. Mellin: Just a moment, Your Honor. I object to this; he only claims to be the inventor of what is stated in the patent in suit; nothing else. This is immaterial and irrelevant.

Mr. Bronson: I want to find out if there is any part of this that is integral with the device——

The Court: Of course that goes to the other question of validity of the patent and I haven't read it yet, but I suppose this is on the theory of combination of elements; is that right?

Mr. Bronson: That is exactly right, Your Honor. and we are going through, and I am confident that Mr. Johnson will have something to tell me about his claims here that will be important to the case and important to the jury in deciding [86] it, and to Your Honor, too.

Mr. Mellin: I still object, Your Honor. He is the inventor only of what is claimed in that combination.

The Court: That is what he claims.

Mr. Mellin: That is what he claims, and that is all that is before the Court.

The Court: If on its face it is a combination and it doesn't meet the legal standards, then it hasn't got validity; if it does meet the standards it has validity. I don't think what this witness has to

(Testimony of Wallace J. S. Johnson.)

say about it makes any difference one way or the other, any more than any witness who takes the stand and says "I think I am right about my case." He doesn't decide it. That is what he is here for, and that is practically the whole problem in any patent suit.

Mr. Bronson: I might call Your Honor's attention to this: this gentleman is at least the so-called inventor and he is also an expert and qualified as such.

The Court: I don't think he has given any expert testimony.

Mr. Mellin: He has given no expert testimony whatever.

The Court: He has described the patent.

Mr. Bronson: He was questioned and qualified, Your Honor, as I understood it, as an expert, when they went through at some length his qualifications in this field in order to explain the device. [87]

* * * * *

Q. Mr. Johnson, let me ask you this: Do you contend that your patent here in suit was the first device that constituted a portable scaffold?

A. I contend that this is my—the patent did issue to me on an adjustable supporting leg for a scaffold.

Q. Yes, but not the first portable scaffold?

A. No, not the complete scaffold, no.

Q. Not the first scaffold on rollers or casters?

A. No, I don't contend that this is the first. [92]

Q. You are familiar, are you not, with the pa-

(Testimony of Wallace J. S. Johnson.)

tents cited by the Patent Office of prior art in connection with the issuance of your patent?

A. Yes.

Q. You are familiar with the Uecker Patent that is cited there? A. Yes.

Q. And you are familiar with the Prowd patent, are you not? A. Yes.

* * * * *

Redirect Examination

Mr. Mellin: Q. Mr. Johnson, counsel asked you if you are familiar with the Uecker Patent which was cited by the Patent Office? A. Yes.

Q. Do you recall that? A. Yes. [93]

Q. I hand you Exhibit 4, and in referring to that Uecker Patent that he refers to, I will ask you if that is a quick adjustable leg for a scaffold in the sense of the device of the patent in suit?

A. No.

Q. Would you compare the showing of the Uecker Patent with the former leg of the defendant, the one which they used before the infringing device, and that is Exhibit 12, and describe the differences, if any, between the adjustable leg of the Uecker Patent and that in Exhibit 12? Do you have the patent? A. Yes.

Q. What number is it, please?

A. Number 2,043,498. In Figure 6 of this patent it shows a screw jack type leg substantially like Exhibit 12.

Q. And its mode of operation is it different or similar to Exhibit 12?

(Testimony of Wallace J. S. Johnson.)

A. It is similar in its mode of operation.

Q. Does it have a mode of operation similar or different from that of the device in the patent in suit?

A. It has a different mode of operation than the device under question.

Q. Would you turn to the Prowd patent that counsel also referred to? Do you have it?

A. Yes, I have that before me. [94]

Q. Would you state whether or not that is an adjustable leg for a scaffold?

A. No, this is a patent on a pipe coupling.

Q. And would you state whether or not, without changes, it could be made into an adjustable leg for a scaffold?

A. No, *I* couldn't be made into an adjustable leg for a scaffold; it would be inoperable.

Q. Thank you, Mr. Johnson. Now with respect to the patent on a scaffold unit that was shown in patent Exhibit 5, do you still make that type of scaffold unit?

A. The type of scaffold unit shown in Exhibit 5, copy of the patent, is a stairway type scaffold. That we still manufacture, yes.

Q. Is that the type of scaffold shown in this advertisement, Defendant's Exhibit A, which counsel handed you?

A. Yes, it is the same scaffold.

Q. Besides that particular type of scaffold unit, what other type of scaffold do you make?

(Testimony of Wallace J. S. Johnson.)

A. Portable scaffolds, the type you see here in the court room, Exhibit 8, I believe it is.

Q. This isn't the type shown in the advertisement, is it?

A. No. We make several types of scaffold. This in the court room, Exhibit 8, is known as the span type scaffold, which we make in either 6, 8, or 10-foot lengths. The type shown in—what exhibit is that? [95]

Q. "A."

A. "A" is a stairway type scaffold.

Q. And you make other types in addition?

A. Yes; for example, a high-clearance scaffold; a 6-foot span scaffold.

The Court: Q. Some of these scaffolds haven't got the adjustable legs?

The Witness: All of the scaffolds we manufacture in our commercial line have the same rollers and adjustable legs.

The Court: The one that is in this advertisement has the adjustable legs, has it?

The Witness: Yes, it does.

Mr. Mellin: Q. Have you ever commercially manufactured any portable scaffolds without the adjustable leg which is here in issue that you know of?

A. Well, I will have to qualify my answer, because occasionally we are asked to bid on a special scaffold, usually known as a work stand for rolling on perfectly level floors, for example in aircraft factories, and occasionally we do build such

(Testimony of Wallace J. S. Johnson.)

scaffolds without the adjustable legs, but they are not a part of our commercial line of scaffolds, and I should say at least 95 per cent of our production of scaffolds is with the same adjustable legs we have under discussion here.

Q. Over what period of time, Mr. Johnson?

A. Ever since the first scaffold was shipped in February [96] of '47 until the present.

Q. What other companies are in competition with the Up-Right, Inc. as far as your own knowledge is concerned with reference to this portable aluminum scaffold with its adjustable legs?

A. Only one company, to my knowledge.

Q. What is that?

A. Patent Scaffolding Company.

Q. You referred to filling Government orders; was it the Patent Scaffolding Company or some other company?

A. It was the Patent Scaffolding Company.

Q. You spoke of an incident where you saw one of their adjustable legs on a scaffold, I think you said in January of 1951, or January of '52; do you recall it?

A. Yes, at a plant maintenance show.

Q. Do you recall another instance of a Patent Scaffolding being sold to the Palace of the Legion of Honor here in San Francisco?

A. Yes, but that I believe was a bid on which we quoted in November of 1952.

Q. And what type of leg was furnished by Patent Scaffolding Company, if you know?

(Testimony of Wallace J. S. Johnson.)

Mr. Bronson: Isn't this before the issuance of your patent—before the filing of your suit, rather?

The Witness: The bid was in November.

Mr. Mellin: Just a moment, Mr. Johnson. Excuse me, Mr. [97] Johnson. If Your Honor please, we are showing direct copying here, the fact that it was copied.

Mr. Bronson: At that time you didn't have a patent.

Mr. Mellin: It was copied before the patent issued, and the copying is there to show the basis for asking the Court perhaps, for an increase in damages because of the deliberate character of the infringement. The copying was effected before the patent in suit, and they continued the copying after the patent in suit, which doesn't make it any less deliberate, and the inference that Mr. Bronson gave is that Patent Scaffolding Company sold them to the United States Government, filled orders before that time, when actually that isn't the question. He asked about it, so I am clearing it up.

The Court: I don't think he asked that——

Mr. Mellin: Oh, yes.

The Court: ——for the purpose of showing that it was only the United States Government.

Mr. Mellin: That is what he asked, and he asked before the patent issued.

The Court: I will overrule the objection.

The Witness: Could you repeat the question, please?

(Testimony of Wallace J. S. Johnson.)

The Court: He asked you about an incident at the Palace of Fine Arts.

The Witness: The bid was requested in November, but the Patent Scaffolding Company made delivery in January. [98]

Mr. Mellin: Q. What type of scaffold was it?

A. It was——

Q. I mean as far as the legs were concerned.

A. It had legs on it of the type in Exhibit 10, I believe, it is.

Mr. Mellin: That is all.

* * * * *

Recross-Examination

Mr. Bronson: Q. Did you say that the Uecker Patent referred in the file wrapper was the same as Exhibit 12, one that would fall apart here?

A. I said that it operated in a similar manner.

Q. Take a look at this enlarged picture when I hold it up here. That Uecker Patent which came about in 1934, twenty years ago, for a scaffold had a screw member, the inner member and the outer one locked by screw threads, and it couldn't fall out, isn't that right, Mr. Johnson, and it is not the same as Exhibit 12 that you were at pains to have fall apart here when you demonstrated it for the jury?

A. Would you excuse me. I am not sure I understand exactly what the question is. I thought it was a statement. Will [99] you repeat it?

Mr. Bronson: Have the Reporter read it. If that

(Testimony of Wallace J. S. Johnson.)

is a rebuke I may have to accept it, Mr. Witness; I am sorry. But I will restate the question.

Q. Is it not a fact—and I will hold this up here once more for you—that that Uecker patent has an internally and externally threaded arrangement between the inner and outer members so that it cannot fall out?

A. The inner member has no unthreaded portion on the end of it and therefore the device could be so adjusted that the inner leg would fall out of the outer leg.

Q. How was that going to happen when you have got it screwed in there?

A. Simply by unscrewing the inner screw out of the——

Q. The same as you do on your own invention when you pull the collar out?

A. Those are two different functions and are not comparable. I am referring to the fact that this device has an unthreaded portion on the inner thread of the leg preventing its falling out if you screw the device to the extremity of the threaded portion.

Q. Mr. Johnson, on Exhibit 12 with which you compared the Uecker Patent there is no threaded portion to hold the outer member together with the inner member and prevent the falling out of the inner member, is there, in Exhibit 12? [100]

A. There is no threaded portion on the outer tube, no.

Q. That isn't true of the Uecker Patent, is it?

(Testimony of Wallace J. S. Johnson.)

A. From the drawing I can't say. I don't think the drawing shows whether or not there is a thread between the nut and the outer member or not.

* * * * *

The Court: There is no use *giving,* into these colloquies. Don't pay any attention to the lawyers' arguments.

Mr. Bronson: Q. Will you look at the Prowd invention that is pictured there? Are you familiar with that from an examination of the file wrapper on the patent in suit?

A. I am familiar with that drawing, yes.

Q. You have a color there that is in green, have you not? A. Yes.

Q. That is slidable against the parts of the outer member that are threaded internally and bring them into contact with [101] the other portion, the inner member, and lock them?

A. Which member are you referring to?

Q. I am referring to several; first, this collar in green which is in one position here.

A. Yes, Number 17.

Q. Here is Number 17 in a locked position. Now, we will take the yellow portion which has parts that are not integral of the outer member that are brought together by sliding a collar down and engaging the inner threading of the outer member with the outer threading of the inner member just as yours does; isn't that right?

A. The collar brings those segments together, but it does not do it in the same manner as to the

(Testimony of Wallace J. S. Johnson.)

function of the device that the patented article under suit does.

Q. Yours has this addition that the blue portion ends up against there and this slides telescopically inside of the other member; is that correct?

A. That is one of the differences, yes.

Mr. Bronson: That is all at this time, Your Honor.

I am not offering these at this time, Your Honor.

The Court: You better mark them or identify them in some way so the record will show what you referred to.

Mr. Bronson: Yes. The first is the drawing from the York Patent.

(The drawing referred to was thereupon marked [102] Defendant's Exhibit B for identification.)

Mr. Bronson: The second is from the Prowd patent.

(Thereupon the drawing referred to above was marked Defendant's Exhibit C for identification.) [103]

* * * * *

Further Redirect Examination

Mr. Mellin: Q. Mr. Johnson, at the close of yesterday's session, Counsel for defendant showed you an enlargement of the Eucker Patent, 2,043,498 and insisted that there was a threaded connection between the sleeve in the leg and the screw threaded leg. Have you examined that patent since yesterday?

A. Yes, I have.

(Testimony of Wallace J. S. Johnson.)

Q. Do you find any such screw threaded connection?

A. There is no screw threaded connection between the sleeve and the outer scaffold leg.

Q. Referring to Exhibit 12 as far as the connection of the sleeve with the leg is concerned, how does the disclosure of Eucker patent compare with Exhibit 12?

A. The sleeve in the Eucker Patent goes into the leg in exactly [104] the same manner that this sleeve does, with the exception that in the Eucker patent the sleeve is held in with a bolt going across through the tube.

Q. And the leg itself is threaded, is it, Mr. Johnson?

A. Oh, yes, the inner adjusting screw thread is a thread.

Q. And like or unlike that that you have in your hand? A. Yes, the same.

Q. What adjustment is the leg of the Eucker Patent capable of making?

A. The adjustment of the Eucker leg is the same as the adjustment of this leg shown in Exhibit 12, the only difference being that in this leg of Exhibit 12 the nut is turned on the screw, whereas in the Eucker Patent, the screw is turned within the nut, but they are both a combination of a sliding nut and a screw.

Q. In other words, the sleeve in the Eucker Patent and also in Exhibit 12 are sleeves merely into the leg; is that correct?

(Testimony of Wallace J. S. Johnson.)

A. That is correct.

Q. Is the device in the Eucker Patent capable of functioning in the fashion that you demonstrated the patented leg in Exhibit 8? A. No.

Q. Is it capable of producing or not the quick adjustment that you described?

A. It is incapable of producing the quick adjustment. [105]

Q. Counsel also called your attention to the Prowd Patent, Defendant's Exhibit C for Identification. Do you recall that?

A. Yes, I recall that.

Q. What is that device?

A. That is a pipe coupling.

Q. And is it capable, as it is constructed in the patent, of performing the functions of an adjustable scaffold leg? A. Absolutely not.

Q. Does it operate in the fashion or not of the leg of the patent in suit? A. No.

Mr. Mellin: And I have been referring to Patent No. 2,388,179. That is all.

Just a moment, Mr. Johnson.

Mr. Mellin: Q. Over the period of time, how many scaffolds has Up-right, Inc., manufactured which included the instantly adjustable leg that is disclosed in the patent in suit?

A. To what period exactly do you refer?

Q. To the period whenever you made the legs?

A. From February 28, 1947 until the present time?

Q. That is correct.

(Testimony of Wallace J. S. Johnson.)

A. Up until February of this year—to February of this year or last year? [106]

Q. 1953; pardon me.

A. Let's see; from February 28, '47 to February 15, '53, we have manufactured between 19 and 20 thousand.

Q. Scaffolds?

A. Scaffolds employing these adjustable legs.

Q. How did you arrive at these figures?

A. We arrive at that figure by adding up the number of adjustable legs, four of which go to each scaffold we have manufactured, and there are approximately 79,500 of such legs.

Q. That you have manufactured during that period and sold? A. Yes, that's right.

Mr. Mellin: That is all.

* * * * *

VICTOR W. MENG

was called as a witness on behalf of the plaintiff herein, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Please state your name to the Court and to the [107] Jury.

The Witness: Victor W. Meng.

Direct Examination

Mr. Mellin: Q. Where is your residence, Mr. Meng?

A. 257 Stewart Avenue, Garden City, New York.

Q. And what is your occupation?

(Testimony of Victor W. Meng.)

A. I am President of the Patent Scaffolding Company.

Q. And how long have you been associated with the Patent Scaffolding Company?

A. Approximately 38 years.

Q. And during that time they have been engaged in the manufacture of scaffolding of various types? A. Yes, sir.

Q. As I understand it, it is one of the older and larger of all the scaffold companies in the Country, is that correct?

Mr. Bronson: I object to that as incompetent, irrelevant and immaterial.

Mr. Mellin: I will withdraw it, Your Honor.

Mr. Mellin: Q. Mr. Meng, you heard your Counsel yesterday state that these instantly adjustable legs that we have been speaking of that are shown in the patent in suit were called for on various bids for scaffolding; is that correct?

A. Yes, sir.

Q. And if you had not supplied that particular leg on those [108] bids, you would not have been successful in obtaining the bids; that is right?

A. That is correct.

Mr. Mellin: If the Court please, there were certain interrogatories filed in this case looking to the number of scaffolds manufactured and sold by the Patent Scaffolding Company during the period for which we contend damages, which, to wit: December 12th of 1952 to February 25th of 1953.

(Testimony of Victor W. Meng.)

The Court: I am not quite clear. What is the period?

Mr. Mellin: The period from December 18th of 1952 to February 25, 1953. That is the interim between the filing of the original Complaint, Your Honor, and the filing of the Amended Complaint. And we have recapitulated those into the number of scaffolds and the total sales price of those scaffolds which had the patented leg, and we have arrived at the figure of $18,309.20. I understand that Counsel is willing to stipulate that the recapitulation that I have is true, correct and accurate, but it will, however, be subject to any correction if any error is found.

Mr. Bronson: That is right, but I add this: that the number of scaffolds sold in that interval of time that you mentioned is 61 scaffolds.

Mr. Mellin: That is correct. That is on the recapitulation.

Mr. Bronson: And also say that the stipulation will [109] follow exactly the terms of the answer that Mr. Meng gave to the interrogatories Counsel mentioned, and that figure of $18,309 represents the total gross sales price of the entire scaffold involved.

* * * * *

(Whereupon recap referred to and heretofore more particularly described was received in evidence and marked Plaintiff's Exhibit 18.)

Mr. Mellin: That is all, Mr. Meng.

The Plaintiff rests, Your Honor.

Plaintiff Rests.

Mr. Bronson: At this time, if the Court please, on the law side of this case, I will reserve a motion for a directed verdict and not make it at this time, it being understood that it will be debated and pursued more at length at the close of the case.

The Court: Very well. [110]

* * * * *

Mr. Bronson: I have supplied some enlarged drawings of [113] the patents. Suppose you wait while I go through some other matters.

I now offer in evidence, if the Court please, preliminary to the testimony, explanatory of prior art, the following:

As our next Exhibit the soft copy from the Patent Office of Patent No. 1,679,017, July 31, 1938, issued to J. M. Athans.

(Thereupon the Patent above referred to was received in evidence and marked Defendant's Exhibit D.)

[See Book of Exhibits.]

Mr. Bronson: Next, if the Court please, a patent to R. A. Eucker, No. 2,203,114, granted June 4, 1940. And I might say in passing that is to be distinguished from another Eucker Patent which is already referred in evidence as Defendant's Exhibit B, which is a patent granted four years earlier, June 9, 1936.

(Thereupon the Patent above referred to was received in evidence and marked Defendant's Exhibit E.)

[See Book of Exhibits.]

Mr. Bronson: A patent granted to G. A. Countryman, No. 1,912,475, June 6, 1933.

(Thereupon the Patent above referred to was received in evidence and marked Defendant's Exhibit F.)

[See Book of Exhibits.]

Mr. Bronson: Letters to M. Taylor, No. 747,270, granted on December 15, 1903. [114]

(Whereupon patent heretofore referred to was received in evidence and marked Defendant's Exhibit G.)

[See Book of Exhibits.]

Mr. Bronson: Letters to J. Burns, 1,181,734, on May 2, 1916.

(Whereupon Patent above referred to was received in evidence and marked Defendant's Exhibit H.)

[See Book of Exhibits.]

Mr. Bronson: Letters granted to J. Stevens and others, No. 351,474, Patented October 26, 1886.

(Whereupon Patent above referred to was received in evidence and marked Defendant's Exhibit I.)

[See Book of Exhibits.]

Mr. Bronson: Next is the Hinckley—— [115]

* * * * *

I offer next Letters Patent to G. A. Hinckley No. 135,988, issued February 18, 1873.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit J.)

[See Book of Exhibits.]

Mr. Bronson: J. S. Birch, Patent No. 210,235, issued November 26, 1878.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit K.)

[See Book of Exhibits.]

Mr. Bronson: Patent issued to E. Michelin, No. 750,675, issued on January 26, 1904.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit L.)

[See Book of Exhibits.]

Mr. Bronson: Next is C. T. Mapes, No. 845,152, patented May 21, 1907.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit M.)

[See Book of Exhibits.]

Mr. Bronson: And finally Letters to F. Moore, No. 2,184,358.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit N.) [116] * * * * *

[See Book of Exhibits.]

GEORGE B. WHITE

was called as a witness on behalf of the defendant herein, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated.

The Court: Will you state your name to the Court and to the Jury?

(Testimony of George B. White.)

The Witness: My name is George B. White.

Direct Examination

Mr. Bronson: Q. Where do you live, Mr. White?

A. I reside at 2965 Nineteenth Avenue, San Francisco, California. [117]

Q. And what occupation do you follow?

A. I am a patent attorney and an attorney-at-law.

Q. Will you state to the Court and Jury what technical training and background you have? I am asking you to just go through those letters please, briefly.

A. I had three years of engineering at Budapest, Hungary, graduating as a mechanical engineer. I took a graduate course at the Northwestern University, Boston, Massachusetts in automative engineering. I worked for the General Electric Company Lynn, Massachusetts, and for B. F. Sturtevant at Hyde Park, Massachusetts as a designing engineer. I worked for the Denver Rock Drill Company at Denver, Colorado as tool designer; for the Pacific Electric Manufacturing Company at San Francisco, California as designing engineer; and worked as patent draftsman, and at that time I consulted and designed various inventions for inventors.

In 1928 I was registered as a patent attorney, and in 1933 I received a Master of Law Degree at the University of San Francisco. Since 1931 I have had my own office and prosecuted a large number of patent applications before the patent office.

(Testimony of George B. White.)

Q. You had prepared and prosecuted patent office applications, have you?

A. Yes, hundreds of them.

Q. That is part of your professional activity?

A. Almost entirely.

Q. Almost entirely. Now, Mr. White, have you examined the file wrapper in the case in suit?

Mr. Mellin: If the Court please, may I examine as to his qualifications to testify as an expert?

Mr. Bronson: We do not expect to use him in the technical sense as an expert at all, Your Honor. I might say——I don't want to interrupt you——

Mr. Mellin: That is all right.

Mr. Bronson: ——but Mr. White is here to explain things that would take the jurors days and days if they went through the documents that I handed to Your Honor. The pictures are here, they only require an explanation; and as I understand it, he won't be asked to testify as an expert except insofar as he can read a patent and look at the picture and see what it means.

Mr. Mellin: What I want to be sure——I want the Jury to understand thoroughly what these prior arts devices are, Your Honor; but where we have a patent lawyer who normally practices before this Court as a patent lawyer. He has been seated at the Counsel Table with Mr. Bronson. I want to know in what capacity he is here, whether he is here as an attorney or as a witness. I would like to ask the witness that.

Mr. Bronson: You go ahead and ask him.

(Testimony of George B. White.)

Mr. Mellin: I would also like to ask his qualifications [119] insofar as scaffolding is concerned.

Mr. Bronson: Is this in the nature of voir dire, do I understand, Your Honor?

Mr. Mellin: Yes.

The Court: Yes.

Voir dire Examination

Mr. Mellin: Q. What experience, practical experience, if any, have you had in scaffolding?

A. I studied structures and beams in connection with my course in mechanical engineering. In 1923 I took a University Extension course from the University of Wisconsin particularly on beam structures and stresses.

Q. But not scaffolding particularly?

A. Well, it involved bridges, beams and other supporting structures. I designed several devices for supporting structures, but not specifically scaffolding. I do not believe that the problem of scaffolding is different from any other stresses in structures under which tubes are used to support structures, but I never designed specifically any scaffold in my life.

Q. Would you answer my question now, Mr. White: What practical experience have you had with scaffolding, if any?

A. None, except I stood on it, I examined it and took them apart and put them together. [120]

Q. Then that was in preparation for this case?

A. Well, no, I observed scaffolding before; I

(Testimony of George B. White.)

saw them on the street as everybody else does.

Q. What scaffolding did you see on the streets?

A. Well, I saw the usual scaffolding which was in front of buildings on Montgomery.

Q. Did you ever see any scaffolding like Exhibit 8 before you commenced to prepare for this trial?

A. In what respect?

Q. In respect to the legs? A. No.

Q. In other words, then, the first time you saw scaffolding of this character, Exhibit 8, was when you were called in to prepare for your testimony in this trial?

A. The first time I observed that was then.

Q. And you of course are being paid your usual fees to appear here? A. Yes, sir.

Q. Are you in a single capacity as a witness or a double capacity of a counsel and witness?

A. I was not called into this case until it was far along,——I believe it was sometime last December ——and I was not advised of the pleadings or state of the pleadings and I didn't even read the pleadings. and I was not consulted on any of the phases involved in the usual legal procedure leading up to trial, except to prepare an opinion, complete a search on the scaffolding art, and to give an opinion as to the prior art.

Q. Is that what you were counseling with Mr. Bronson yesterday at Counsel Table during the examination of Mr. Johnson?

A. Yes, I was giving him ideas on the structures such as the Uecker Patent; when Mr. Johnson tes-

(Testimony of George B. White.)

tified that it will fall out the same way as the other, I called his attention to the patent, that it would not. * * * * *

Direct Examination (Resumed)

Mr. Bronson: Q. Did you examine the file wrapper in this [122] case in suit, Mr. Johnson's patent? A. I did.

Q. Have you prepared an enlargement by photograph of his device as it is shown in the file wrapper?

A. I have prepared an enlargement of figures 2 and 3 of the drawings of the patent which show enlarged the adjusting structure.

Q. I have his patent here which I am holding up showing three figures. The two at the bottom which are enlargements of the extensible leg are the parts that you enlarged? A. That is right.

Q. Will you put that up on the Board for such reference as you may make?

(Whereupon the enlargement referred to was placed on the board.)

Mr. Bronson: Do you have also with you enlarged drawings of the prior art that was cited by the Patent Office in the file wrapper by that office in connection with the granting of Letters Patent on Mr. Johnson's device?

A. Yes, I had photostatic enlargements made and grouped them according to their various characteristics.

Q. Can you put those up on the board so that they are visible one by one to the jurors?

(Testimony of George B. White.)

A. I can't put them up one by one because they are bound together. [123]

Q. That is all right; I know what you have there and we will go through them.

The Court: Put those on the hooks.

(Whereupon the enlargements referred to were placed on the Board.)

Mr. Bronson: Q. The file wrapper makes reference to three prior patents called Wilson, Finkle and Brill. Are those shown on that first drawing?

A. Yes, certain of the views. I must have it understood that in enlarging, in certain of the cases, I enlarged only as many of the views as would best illustrate the various elements in those patents. As it happens, on these three patents the entire patent drawings are being reproduced.

Q. Will you explain to the Jurors what the practice is in the Patent Office of citing certain patents? What is the meaning of that?

A. When an application is filed in the United States Patent Office, the Examiner makes a search of the records and whatever patents he finds which he considers close to the invention, he cites in a so-called office letter, in which he gives the name and the number of the particular patent and advises the applicant why his claims are rejected, and thereafter the applicant has a chance to argue—submit an argument to the examiner stating why the examiner was wrong in rejecting the claims, or write new claims if he wants to; and then examiner goes through the same procedure again until

(Testimony of George B. White.)

such time that the examiner agrees to allow certain claims, such as in this application, one claim, because he cannot produce at that time any additional reference closer to the ones that have been previously produced. And these three patents are among the patents which the examiner cited. We call them references cited by the examiner during the prosecution of the application in the United States Patent Office.

Q. I show you on Exhibit 3 of the Plaintiff in this case,—that is the file wrapper—the pages are not numbered, but it is the fifth from the last page, a sheet entitled "References cited."

A. That is part of what we called the file wrapper and contents which is in evidence here as Plaintiff's Exhibit 3. On Page 40 there is a summary of all the references cited by the examiner against this application in the patent office, and the first three of those references are the patents to Brill, Willson and Finkle. The three are produced on the first page of the photostatic enlargement I have on the Board.

Q. So I won't have to refer to this, the remaining references there from the file wrapper are under what names of the patentees?

A. The remaining references are Luarde, Fogelstrom, Uecker No. 2,043,498, Burman, Kotler, Prowd. These are the United States patents. I have all of these reproduced excepting the [125] reference to Kotler, because that is just a duplication,

(Testimony of George B. White.)

as I will point out, of certain of the other references reproduced.

Then there was cited a foreign patent, a British patent granted in 1885. And those are the total references.

Now, turning to the drawing there closest to you which you have identified as Mr. Johnson's patent in this suit, certain coloring matter is on there. Can you explain to the Jury the coloring scheme you have adopted in that drawing?

A. I adopted a coloring scheme just to have different colors of different main parts of the part of this particular patent. In order to understand why I reproduced only Figures 2 and 3 in this case is because most of the alleged invention was directed to the——

The Court: That has already been covered, Mr. White. We know that is the only thing that is in issue.

The Witness: I have colored the tube in purple, the inner screw leg in blue; the fingers which are on the end of the tube in yellow; the split nut on the end of the fingers in red, and the collar which pushes the nuts together—I mean the nut segments together—in green.

Mr. Bronson: Q. Have you followed the same scheme on the Figure 3 there? A. Yes.

Q. For all of those devices? [126]

A. Yes.

Q. And in that case the collar in green is

(Testimony of George B. White.)

raised from the position it is shown in Figure 2; isn't that right?

A. In Figure 3, the collar—the green collar is raised so as to allow the yellow fingers to expand and also to expand with them the segments of the red nut so as to——

The Court: Mr. White, you answered the question. I always have that same trouble in trying patent cases. The attorney asks a practical, simple question that can be answered yes or no. Don't give a lengthy explanation of it, because the attorney has asked just what he wants.

Mr. Bronson: Would you go first to the Willson Patent, then to the Finkle Patent and then to the Brill Patent which was cited by the Examiner, as you stated in connection with Mr. Johnson's Patent, and explain the parts of those and how they operate. Be as brief about it, Mr. White, as you can, consistent with making your explanation clear?

A. The Wilson Patent, which is shown in the left-hand corner on the chart is a device for attaching a hook on the end of a rope, and apparently the examiner referred to it——

Mr. Mellin: If Your Honor please, apparently I must object that that is improper——

Mr. Bronson: Just describe the operation.

The Witness: It shows the yellow fingers which are half segments which can be separated, and it shows the green collar [127] for the purpose of pressing the fingers together so as to press them on the end of the rope.

(Testimony of George B. White.)

Mr. Bronson: Q. This structure in here which is B is not a steel member, but rope—not a metal member; is that right? A. That is right.

Q. And these fingers, one of them is coterminus with the hook, and the other is swiveled out on a pin, is that right? A. That is right.

Q. Is the inside of the metal part of it threaded at all?

A. No, it is not. It has certain impressions corresponding to the strands of the rope so as to grab it strongly.

Q. Let us go over here to this Brill Patent at the bottom. What is the scheme there and what is it for and what parts do you find that correspond to Mr. Johnson's?

A. The scheme is substantially the same as in the Willson Patent. It has yellow resilient fingers with the green collar to hold them together over a rope. In that case it is a hook to attach to the end of a rope.

Q. Is it threaded—any part of the inside of it?

A. It is not threaded. It has grooves in it so as to make it rough and thereby grab the rope stronger.

Q. Is there any hinge action in the fingers there similar to the one in the Willson Patent?

A. The Brill Patent has no hinged action, but it describes [128] a spring action. These fingers spring apart.

Q. Let us go to the patent of Finkle. Will you explain that?

(Testimony of George B. White.)

A. The Finkle Patent is a patent on a crutch and it has an extension leg which is colored blue.

Q. All right.

A. That blue extension leg is gripped between the lower ends of the crutch sides, which I colored yellow because they correspond to the fingers, and there is a green sleeve which pushes them together. In that case there is no thread either, but there are teeth formed oppositely, just circular grooves, so as to be sure that the extension leg is not going to fall out or slip up while the crutch is in use.

Q. You have colored the collar or the sleeves in green to correspond with this?

A. That is right.

Q. And you have the inner member blue to correspond with the blue on the Johnson Patent drawing? A. That is right.

Q. And the teeth, or the structure corresponding to teeth, you put in yellow?

A. No, the structure corresponding to fingers are colored yellow. They are the ends of the sides of the crutch which are pressed together on the extension leg.

Q. Do you find any of the other structures that are in the [129] Johnson Patent in any of those three?

A. I do not find in any of those three any threaded connection, any split end, nor the purple telescoping tube.

Q. All right. I will turn this over if I can, and we will go to the next group you mentioned when

(Testimony of George B. White.)

you read off the other patents in the file wrapper relied upon by the Examiner in granting Mr. Johnson's patent, the one granted to Luarde and the one to Fogelstrom, taking those together, if you can, in the interests of time. What do those patents represent?

A. They represent screw extensions in the bottoms of the legs. They amount to variations in structure, but nothing more than a threaded socket into which a threaded shaft is screwed and on which there is a rubber cushion or lug. That is to adjust the height of the legs by screwing in or out to selected height.

Q. Other than the threaded connection between the legs and the inner member, do you find any similarity between that and the Johnson Patent?

A. The similarity is limited to the threaded connection and the extension of legs; it hasn't the split nut and isn't capable of the quick sliding adjustment.

Q. And still on the patents cited by the Patent Office in granting Mr. Johnson's patent, here are the drawings of Uecker, (I will call it 498, referring only to the last three numbers) and Burman. Discuss those, please, if you will. [130]

A. In general the Uecker 498 Patent and the Burman Patent are in the same class as the previous patents; they are screw extensions.

In the Burman Patent there is a socket or sliding nut provided, and into that nut is threaded a screw extension. And in the Uecker Patent, which

(Testimony of George B. White.)

is on a scaffolding, there is inserted in the end of the purple tube a bushing which is threaded on the inside and which is also purple.

May I step up there?

Mr. Bronson: Yes.

The Witness: And this bushing is held solid in the end of the tube by a pin which is held by a wingnut tight, and the extension leg is screwed into that bushing so that it won't fall out. The only adjustment this shows is the screw adjustment; it isn't capable of sliding adjustment.

Q. Will it fall out, by the way?

A. No, it could not fall out because this screw shaft is threaded into the bushing and the bushing is held by this cross pin in place so it couldn't be taken out until the pin is moved.

Q. Will you refer to the patent description of that internal and external screw adjustment in the Uecker Patent, 2,043,498?

A. The Uecker Patent No. 2,043,498 on Page 2, the line beginning on Line 2 states:

"The foot 19——" [131]

Q. The foot what? A. (Reading)

"The foot 19 has a threaded shank 23 which engages with the interiorally threaded sleeve 21 to form an adjustable footing."

The threaded sleeve 21 is the one I described as a bushing.

Q. You have covered those. Incidentally, Uecker No. 498 is part of a scaffolding, is it not?

A. It is a scaffolding, and it also has portable

(Testimony of George B. White.)

feature in as illustrated in Figure 7, and that is described in the Patent on Page 2.

Q. We won't go over it, but it provides for a caster arrangement, is that right?

A. Yes, it provides for a caster arrangement to make it portable.

Q. Still going on with the file wrapper references—Did you want to add something?

A. I would like to add this: That there is one reference which is left out in the large reproduction, and that is the Patent to Kotler, No. 2,327,050, which is also cited by the Examiner, and the reason why I have not reproduced it is because I didn't want an enlargement, because this is practically identical with the other screw adjustments; it screws in and out.

Q. Let us go on to Pumphrey. [132]

A. Pumphrey is the British patent.

Q. Describe it, please.

A. That British patent has no particular significance in connection with Mr. Johnson's device. It is a fully collapsable tripod leg. It is either fully collapsed or full extended, it has no adjustment; but on the end of each tube there is a screw thread, and on the end of the next tube there is a corresponding screw thread so that after the leg is extended all parts can be screwed together so that they won't collapse when weight is put on them. But they are not adjustable; when they are screwed together they remain in that position extended. When the screw is loosened, then they collapse alto-

(Testimony of George B. White.)

gether and they are not adjustable either way as to length.

Q. Other than the telescopic feature?

A. Other than the telescopic feature.

Q. Is there any similarity that you find by comparison with Mr. Johnson's device?

A. The only similarity I found was that it had telescopic parts; they telescope into one another. Beyond that there is no similarity.

Q. The final reference in the file wrapper of the patent office as you read them off is to W. T. Prowd, which is shown in this enlarged drawing here. This is again a photograph of a page of the patent record including the upper printing and [133] date, is it not?

A. It reproduces only Figure 1 and Figure 2. The patent shows some small sectional views which I did not think necessary to reproduce in the enlargement.

Q. Will you go through this patent of Prowd and using the corresponding colors of the references to Mr. Johnson's patent, show how the Prowd Patent operates and what it is supposed to do and how that result is accomplished?

A. The Prowd Patent is a pipe coupling.

Q. A pipe coupling?

A. Yes, a pipe coupling.

Q. Is that the way it is described?

A. That is right.

Q. In his own drawing?

A. In his own drawing.

(Testimony of George B. White.)

Q. All right.

A. And the object of it is to take the pipe (5) and couple to it the pipe (7). And for the purpose of that coupling, Prowd uses this split nut principle; mainly, it has the red nut segments just like the red nut segments of the Johnson Patent.

Mr. Mellin: If Your Honor please, I object to that conclusion of the witness, "just like". If he wants to explain the references, I think that is proper; but his opinion as to how it is like is a conclusion which is for the Jury and for the [134] Court.

Mr. Bronson: That may be a conclusion. This is a little technical requirement to merely identify it on the drawing. I think that is all he intended to do.

The Witness: Which corresponds to the split nut, in red, and it has the yellow fingers which carry the split nut members, and it has the green collar for the purpose of pushing together the split nut sections when the threaded portion of the other part (7) is inserted there as it is shown in Figure 1 of the drawing.

In order to release the pipes, this collar, green collar, is pulled off as shown in Figure 2, which allows the yellow fingers to spring apart, disengages the red nut segment so the blue threads of the pipe (7) allows the pipes to be taken apart.

I do not find in the Prowd Patent the telescopic tube of the Johnson Patent. In other words, the two pipes do not telescope into one another. When the pipe is pushed in, that is a fixed position, and the

(Testimony of George B. White.)

coupling locks it in that fixed position; it is not adjustable as to length. Once it is in it stays in and it is tightened up and that is the end of it until it is disengaged. [135]

* * * * *

Mr. Bronson: Q. Mr. White, the part of the Patent which you last described before the recess as shown on the drawing is the last reference in the file wrapper of the United States Patent Office in the letters granted to Mr. Johnson; is that true?

A. Those are all the references that the Examiner cited in the file wrapper. Prowd is the last I described. There are no other references in the file wrapper.

Q. You say that you have made a search or search has been made for other prior art patents pertinent to the Johnson Patent; is that true?

A. Partly by other and partly by me personally.

Q. What is the first one you will call the attention of the Jury to having any of the features of the Johnson Patent? Refer to it, please, by name, number and date.

A. The first enlargement is the patent to Athans, No. 1,679,017, which was granted on July 31, 1928, on an application filed on June 9, 1927. The significance of the Athans Patent with respect to the patent in suit——

Mr. Mellin: If Your Honor please, I object to this line of testimony, "the significance." Now he is giving his conclusion. If he wishes to describe what is in the patent, we have no objection.

(Testimony of George B. White.)

The Witness: The Athans Patent——

The Court: There is always difficulty in restraining experts. I don't say this to be cranky, but lawyers can argue their case and can draw their own conclusions, and it is not necessary to put a lawyer on the witness stand to take his argument under oath, which used to be the practice in these patent cases. As long as the testimony is confined to an [138] explanation of the patent, it is perfectly proper; but the Jury and the Court has to understand, of course, but the witness cannot go any further.

Mr. Bronson: Yes.

The Court: Because otherwise it becomes argumentative, and the argument is not added to in any way because it is given under oath.

Mr. Bronson: I am not apologizing for Mr. White, but I am sure it was an inadvertence.

The Court: I can understand that because a man gets immersed in it and he wants to talk about it; but by and large the men that are immersed in these subjects that want to talk have no terminal facilities, they just keep talking. It is much better if you will ask the questions, Mr. Bronson, and point out what you want to have pointed out to give us the explanation of the patent. You know what you are getting at.

Mr. Bronson: You may be assuming something not in evidence there, Your Honor. I wish I had the facilities that you mentioned a minute ago that

(Testimony of George B. White.)

these gentlemen acquire with years in that profession.

Mr. Bronson: Q. In this patent, do you find the outer tubular member as a part of a leg arrangement?

A. I marked in this patent in purple color the outer-tubular leg extending from the bottom of the table.

Q. Now we are going to try, at least for awhile, to follow [139] the Judge's suggestion that I direct the examination.

Now you colored this in purple. Where is that structure on Mr. Johnson's device as pictured there, shown in purple.

A. Also in Mr. Johnson's device it is the outer tube of the leg.

Q. That is a long member that goes up clear to the top of the scaffold that you show only the bottom of? A. That is right.

Q. Do you find integral fingers on this patent? * * * * * [140]

Mr. Bronson: Q. Will you state whether or not in the Athans Patent there are integral fingers, integral with the outer member, and if so, indicate them? [141]

A. I indicated by the yellow color the spring fingers on the Athans patent which are in the lower end of the purple tube, outer tube.

Q. That is what kind of a device, by the way?

A. That is the service table that you talked about.

(Testimony of George B. White.)

Q. What function does it provide?

A. The purple part is the outer tube of the telescopic leg.

The Court: That is so that those legs can collapse?

The Witness: No; that is so that the legs can be adjusted to any length.

The Court: So a waiter bringing in this table can put it lower or higher?

The Witness: That is right.

The Court: That generally is the purpose?

The Witness: Generally the purpose of it is to adjust the height of the table wherever you want it.

Mr. Bronson: Q. Is there a slidable ring or collar on the Athans device, and if so, indicate it?

A. It is indicated in the green collar. The green collar, 15, which is for the purpose of pushing the yellow resilient fingers together in order to clinch upon the inner blue member so as to hold the two telescoping sections of the leg in an adjusted position.

Mr. Mellin: May I interrupt the testimony and have that question again? Did I hear the word "slidable" in there? [142]

(The Reporter read the previous question.)

Mr. Bronson: Q. The inner member you have colored in blue to correspond to the inner member of the Johnson patent? A. That is right.

Q. And will you state whether or not there are any threaded portions that engage between the inner leg and the outer leg on the Athans patent?

(Testimony of George B. White.)

A. There are no threaded portions between the purple outer tube and the blue inner leg for any engagement. The only threads are in the inside of the green collar 15 which is in the form of a tapered nut, and which is not shown in the patents but described in the Athans patent is that there are threads on the ends on the outside of these yellow fingers so that as this collar is turned it will push together the fingers into solid engagement with the blue inner member of the leg.

Q. Let me take a pointer in connection with the last interruption there. Does the collar in the Athans patent colored in green slide up and down on the Athans patent as the color does on the Johnson patent?

A. It does not; it is threaded on the inside and it has a tapered nut which pushes together the fingers against the other leg.

Q. What is this little place shown by the two lines and a circle? [143]

A. These are the slits between the resilient integral yellow fingers.

Q. Can you state whether or not they represent an aperture going down to the middle of the outer ring as in the Johnson patent?

A. They do. They are slits going right through so the fingers are resilient and separate, and so they can spring.

Q. In connection with this search you developed another Uecker patent than the one that was referred to in the file wrapper. This one has the

(Testimony of George B. White.)

terminal numbers 114 in place of 498, the terminal numbers of the Uecker patent that is in the file wrapper. What does this Uecker patent apply to?

A. The Uecker patent is what is termed a scaffold jack. It is a patent granted in 1940 on an application filed in 1938.

Q. Describe it in the same manner.

A. This is a scaffold jack. The purpose outside tube of the scaffold rests upon the top of a nut and surrounds a portion of that nut. The nut is turned by way of a handle around an inner blue screw member, so that when the nut is turned in one direction or in another it will advance up or down on the blue screw shaft and thereby will push the leg, the purple leg higher or lower according to the adjustment required. The only adjustment possible on this Uecker patent is the fine adjustment through threads. It cannot be adjusted [144] like the Johnson scaffold by dropping it out. On the top of blue screw member there is a cylindrical member which happens to be tubular. On the top and inside of that cylindrical member is a spring, and the spring pushes out through an opening on the side of this tube against the inside of the purple tube so as to create friction and prevent this jack screw from falling out of the outer tube when the top is lifted. And that is the function of this cylindical member on the top, to press and also to guide and raise this inner blue screw member.

Q. What is the corresponding part, if any, on the Johnson patent to that cylindrical tube?

(Testimony of George B. White.)

A. The part marked 17 on the top of the blue screw in the Johnson patent.

Q. This Uecker patent with the terminal numbers 114 is, you say, a scaffold, and I am calling your attention to Figure 1. That indicates what?

A. Figure 1 indicates that the scaffold is on even ground and the legs can be adjusted so that the scaffold will be on the level.

Mr. Bronson: Now we have the Countryman patent. I am referring to these not by the exhibit number but only by the name, Your Honor.

The Court: That is all right.

Mr. Bronson: If we can follow it that way. [145]

Q. Describe the operation of the Countryman patent. In the first place, what is it for?

A. The Countryman patent is an automobile jack. The patent has very many figures; in fact, it has five sheets of drawings. I reproduced only Figure 1 on the first page of the drawings and Figures 6 and 7 on the third page of the drawings, because this is the part of the device that I considered pertinent. This part of the device pertains to an adjustable support on the top of the jack. The idea is to adjust the jack when it engages the automobile both quickly and slowly. For that purpose on the bottom of this purple tube, 25 and 27, there are pivoted a number of yellow fingers, part number 30, the lower ends of which are formed into the split nuts, the red split nuts 28. There is a green collar on the outside of these fingers, the purpose of

(Testimony of George B. White.)

which is that when it is pushed out it engages these little lugs or ears on the fingers to keep them away from the blue screw shaft, thereby allowing this tube to telescope quickly up and down relative to the screw jack 1 and thereby the coarse adjustment is made. For fine adjustment then this green collar is pushed down into the position shown in Figure 7, thereby it presses the red nut segments into threaded engagement with the blue shaft and allows the turning of this purple tube into the fine threaded adjustment. Therefore, to repeat again, when the green collar is in the up position as shown in Figure 6, this [146] outer tube can be moved quickly up or down for any adjustment, and when a fine adjustment is required, then the green collar is pushed down in order to push these nut segments into engagement with the thread on the blue inner shaft so that a fine adjustment can be accomplished.

Q. And what does Figure 1 show?

A. Figure 1 shows in side view any engagement for the threaded adjustment.

Q. These two figures that you have in yellow here, they are shown in yellow in Figure 1, are they?

A. That is right; Figures 6 and 7 are showing the same as Figure 1, only they show it in section as though the tube was cut in half, vertically, so you can look on the inside of it.

Q. How much of the circumference of the shaft does each one of those adjustable screw-threaded

(Testimony of George B. White.)

lugs—how much of the circumference does each one of them take up?

A. Each of them takes—each of the segments of the red nuts there takes up one-half. They are half-segments.

The Court: What did you say? I didn't follow that last. What did you say that yellow 29 is? That is the pawl, isn't it?

The Witness: Yes, that is the pawl. I described it as fingers.

The Court: That is what engages into the——

The Witness: The lower portion of the pawl. The upper portion, the yellow portion, is pivoted and moves in, and the lower portion is threaded for engagement. I divided the two parts in there to show the part which supports the threaded portion on the bottom.

Mr. Bronson: Q. So far as function goes, that red portion that engages the screw thread corresponds to this split nut?

A. It is a split nut for the purpose of engaging the screw thread to——

The Court: Is this the earliest patent of the jack type in an automobile that you found?

Mr. Bronson: I don't think so, Your Honor.

The Court: There were earlier ones?

Mr. Bronson: There must have been. I am not familiar with them. We were looking in our search for quick and rapid adjustments and then fine adjustments.

(Testimony of George B. White.)

The Court: But this is an automobile jack, isn't it?

The Witness: This is an automobile jack on which the other parts of the patent, Your Honor, show it as a——

The Court: I know that there are other parts of it, but generally so the jury can understand what we have been talking about, that is an automobile jack, is it?

The Witness: The reason I couldn't answer yes or no whether this is the earliest I found is because of the large [148] number of patents in the Patent Office on the same subject, I might have found, but this is the earliest I found in Washington in 1933 on this type of jack.

The Court: All right. I imagine, Mr. White, that there must have been a lot of patents at some time or other in connection with thes automobile jacks, or am I wrong about that?

The Witness: I believe—my recollection is that there were in the neighborhood, of this subdivision, of about 600 patents. This type of devices go over various classes of inventions. I examined in Washington in January about 18 of them out of 5400 patents there and I looked over not more than 1100.

The Court: This field of automobile jacks used to jack up automobiles and like things is a very big field?

The Witness: That is what we call a crowded art.

The Court: That is what I thought.

Mr. Bronson: The next one in serial order of

(Testimony of George B. White.)

the prior art that we introduced is the Taylor patent which is described as a screw clamp. Will you describe the operation of that to the jury, carrying forward in the same way the references to Mr. Bronson's patent where you find similar functions?

The Witness: First, Your Honor, I deliberately turned around the Taylor drawing. In the patent these blue shafts, are horizontal, but as an illustration I had it colored so [149] that the blue screw shafts show in a vertical position. This is not a leg; this is a screw clamp, the purpose of which is to take the two jaws and put an object between them and then to tighten up on the screw legs and clamp this by a quick adjustment and then by a tightening screw adjustment.

This patent illustrates the split nut principle as it is adapted to a screw clamp. It has it in the blue inner shaft. It has outside of it a purple-colored bushing which extends through one of the jaws. This bushing is rotable around the blue shaft—screw shaft. On that bushing there are pivoted a number of yellow fingers—two in fact—and on the end of each yellow finger there is a half of a red nut. Outside there is a green collar which slides up and down for the purpose of allowing, in the up position, the yellow fingers to expand, and to push them together in the down position and engage the segments, the red segments of the nut and push them into engagement with the threads of this blue shaft.

(Testimony of George B. White.)

And I might add something here. The fingers—the yellow fingers are not spring fingers. There is a small spring which is hard to see, a leaf spring on the inside of the device for the purpose of pushing these yellow fingers outwardly. To accomplish the adjustment first the green collar is pulled away from the red nut and allows the fingers to expand, and then this entire jaw, movable jaw, is moved [150] on the screw shaft into the position quickly for a given adjustment. After the given adjustment is accomplished and you want to tighten it up, then the green collar is pushed down over the red nuts and then the fingers are grabbed on this whole purple collar here, pushing, and is turned around just like any nut would be turned around for the purpose of the fine adjustment, namely, the tightening of the clamp in position.

This illustrates the split nut principle application to a screw clamp in which there is a quick adjustment by sliding and a screw adjustment by turning.

* * * * *

Q. Next in order is J. Burns, a patent called a temper screw. Will you explain that?

The Court: Which one is this?

Mr. Bronson: J. Burns.

A. J. Burns, Number 1,181,734, patented in May 1916. I would like to explain the function of the temper screw. It is a lug. A temper screw is used in well drilling. In oil wells the drill bit is supported on a supporting structure and as it is moved up

(Testimony of George B. White.)

and down they want to lower it just enough so that every time the bit on the down stroke gets [151] into the well it will hit the bottom. And for that purpose there must be an adjustment, a screw adjustment so that after each stroke when the drill bit comes up they turn the screw once so as to lower the bit just enough so that it will hit the bottom again when it goes down.

And after the entire screw is played out or it is paid out to such an extent that there is no more screw, there is a quick adjustment required so as to grip the screw again and start the operation all over.

The Burns patent is one of these temper screw patents which illustrates that.

The Court: Mr. White, could I interrupt you? The temper screw is something that is well known?

The Witness: Yes.

The Court: As a device?

The Witness: As a device.

The Court: And so the jury will understand it, the Burns patent that you are now speaking of is a patent on a temper screw?

The Witness: It is a particular kind of temper screw; that is right. There are a large number of various kinds of temper screws and we illustrate a few of them. On this temper screw there is first a support which, as you know, is hung on a cross beam or rather, a walking beam as they call it. And inside of that there is the blue threaded [152] shaft on which you carry the drill. I colored yellow

(Testimony of George B. White.)

the lower portion, the lower ends of this fixed support in order to illustrate the part which operates as a finger to spring apart; in other words, inside of your—on the end of your fingers, yellow fingers, there are the split nuts, red split nuts 16. Around the lower end of these fingers there is the green collar, which in this case is not slideable up and down but it has a set screw on the side to tighten it or to loosen it, when it is required.

I will explain that. After the blue screw 1 is low, that is, the blue guide 6 on the top, and the thread gets down to that red nut and cannot go any further, then the operator releases this green collar by the set screw, which allows these yellow fingers on the lower ends to spring apart to disengage these red split nuts from the blue screw, and then the entire screw in this case can be pulled up by this rope into a telescopic position and then the ring tightened up again in that position to reengage the split red nuts with the blue screw and thereby you can continue that threaded engagement.

It offers a quick engagement for telescoping those together, and then there is a threaded engagement or threaded adjustment by handles 21 turning the screw every time on the down stroke.

Mr. Bronson: Q. You colored those different elements [153] of the Burns patent to correspond with the functions supplied by various parts of the Johnson patent, did you?

(Testimony of George B. White.)

A. I have colored them corresponding to the corresponding parts of the Johnson patent.

Q. Here as you look at this there is no green ring but you colored the screw that you said tightens——

A. There is a green ring, but the green ring instead of being slideable, it has a set screw in it, in order to push the fingers together.

Q. Instead of having a tubular column here you have a yoke?

A. That is right. We have sort of a yoke of parallel members instead of it being a complete tube.

Q. With the same notion in mind that you have under the Hinckley patent?

A. The Hinckley patent is another illustration of a temper screw in feeding oil well drills. It operates on the same principle, only in the opposite direction. In this case there are ratchets provided in the tube for turning the screw by a rope. The operator pull a rope and then this ratchet turns in order to feed the screw. We have the blue screw member telescoping inside of this purple yoke, which purple is the tube in the Johnson patent. I colored yellow the spring nuts of that tube, because they spring about; they are fingers, and the red split nut which is held in engagement with the blue screw by a green collar which is [154] again controlled by a set screw.

Q. Have you got a coarse and a fine adjustment on that?

(Testimony of George B. White.)

A. Yes; by disengaging the set screw you can get a quick adjustment between the two telescoping parts. By engaging the set screw and pushing the red nuts in engagement with the threads of the blue shaft there could be a fine thread adjustment step by step.

Q. And your split nut in this case has an internal threading?

A. The split nut has an internal threading, like all split nuts, including Johnson's.

Q. Before we go to the next patent, with reference to the Burns patent which you last described, what is the function of this solid blue part called 6, with reference to the question of whether that inner threaded member can fall out of the yoke device that represents the outer member?

A. The bar, the top member 6 there, is sort of a head on the end of the blue screw, and it slides in a guide-way formed in between these purple members and its function is first to guide the screw and press it, and of course it does not permit the screw to be turned any further than the head 6.

Q. Does it prevent the inner member from wobbling?

A. In that grooved operation, yes, it would prevent wobbling, and it would prevent it being screwed out completely.

Q. Hinckley is another temper screw, is it not?

A. Hinckley is another temper screw as I described upon this stand.

(Testimony of George B. White.)

Q. Does it have a yoke which you have colored purple, and does it have an inner member?

A. Yes.

Q. Which you have colored blue? Does it?

A. It has that, and it has the yellow fingers, the red nut, and the green collar, and it also has "D", which is the head on the end of the screw which would prevent the screw being entirely unscrewed beyond the red nut.

Q. Does that permit a coarse and fine adjustment by operation—— A. Very definitely.

Q. ——and engagement between the internal and external threaded members?

A. That is the sole object of a temper screw.

Mr. Bronson: Do you want me to continue on?

The Court: You have several more of those?

Mr. Bronson: We have finished those temper screws. There are several more, Judge.

The Court: I think then we will take the recess. We will have a recess for lunch now, ladies and gentlemen of the jury. Please return at 2:00 o'clock.

(Thereupon an adjournment was taken to the hour of 2:00 o'clock p.m. this date.) [156]

GEORGE B. WHITE

recalled as a witness on behalf of the defendant, who, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Bronson: Q. The next of those devices that your search developed not mentioned in the file

(Testimony of George B. White.)

wrapper connected with the Johnson patent, was Stevens and Warfield, Number 351,474, October 26, 1886; is that correct? A. Yes.

Q. Will you describe the operation of that, briefly, please, and make a comparison as you go with the elements one by one that are found in the Johnson patent?

A. The Stevens patent is on an adjustable nut for calipers or dividers.

Q. Is it a split nut?

A. It is a segment or split nut as it is indicated by the yellow elements which support the red threaded nut portion. In order to engage the blue threaded shaft there for the purpose of adjusting the distance between the arms of the calipers it is necessary first to have a quick adjustment instead of screwing the nut, so for that purpose the nut is released from the green sleeve there. [157]

Q. Will you continue to call that "collar" so we are using the same term? A. The green collar——

Q. I didn't mean to interrupt you, but if you say "sleeve" one time and another time "collar" it may be confusing. Is that what you call a sleeve what we have called a collar?

A. That is right, it is a green collar; and when the nut is pulled out of there then these yellow portions expand and separate the red nut portion from the threads of the blue shaft there, and the one arm can be collapsed slidingly for a quick adjustment. When it is quickly adjusted to the approximate position, then the nut is pushed back again

(Testimony of George B. White.)

into this green collar, then it can be turned for the fine adjustment. So this is an illustration of the segment or split nut principle with the telescopic member relative to another one, which is in connection with calipers.

Q. Here is a device that is a caliper with a sliding member that can be tightened when it reaches the collar and then bind. Does that generally represent the principles in the Stevens patent of 1886?

A. It is pretty close. The collar, which is black in this case——

The Court: Mr. White, why don't you try to answer the lawyer's question and then explain? [158]

Mr. Bronson: Q. Does it generally represent the principle?

A. It generally represents the principle.

Q. Does it have the elements that you have now described to the jury from the drawing of the Stevens patent? A. Yes.

Mr. Bronson: I would like to have that marked, if the Court please, as an exhibit.

(Thereupon calipers were marked Defendant's Exhibit O for identification.)

Mr. Bronson: Q. I think each one of these questions I am about to ask you can be answered with a yes or no answer.

The sliding collar that is marked in green on the Johnson patent, what member corresponds to that on this caliper as I hold it in front of me here?

A. The black collar here which I am moving and sliding along.

(Testimony of George B. White.)

Q. The split nut device on the Johnson patent represented by the red portion there is here in what part of the caliper?

A. It is the threaded end of this nut where the taper is.

Q. And that slides freely on there as long as it is not locked with the collar; is that correct?

A. That is right.

Q. So that the coarse adjustment can be done as long as the collar is not in engagement with the split nut? [159] A. That is correct.

Q. But when it makes the engagement it locks the jaws of the part corresponding to the split nut; is that right?

A. It locks them together and presses them against and into the threads of that shaft there so that you cannot slide it any more.

Q. Does that correspond to the action of the green collar?

A. That corresponds to the action represented in Figure 2 of the Johnson patent where the red nut is first in contact with this, in engagement with the threads of the blue shaft.

Mr. Bronson: In the interests of time—I don't know whether Your Honor would permit it or would even suggest its propriety, but I can go ahead. I have handed the device representing the Stevens patent to the jurors for examination, but I can go ahead with the next drawing and I think we can gain some time.

The Court: Whatever you wish.

(Testimony of George B. White.)

Mr. Bronson: As long as I am not distracting more than one or two jurors at once.

Q. I am showing you the Birch patent for a gun wiper, No. 210,235 being patented in 1887. Will you describe how that device works, again referring to the devices that correspond, if any, in the Johnson patent?

A. The Birch is a gun wiper and he uses the split or segment nut principle at the lower end of it for the purpose of [160] quickly clamping the wiper into position. The elements are the yellow fingers which are resilient, the ends of which are threaded just like the segmented or split nut, and the green sleeve on the outside which can be moved up or down for the purpose of pressing the segment or nut upon the threads of the blue shaft.

Now I want to have it understood that this is not a truly telescopic arrangement. This short blue shaft which is shown in enlargement in the upper end of this photostat is not long enough to allow both fine and coarse adjustment. This is merely a representation of the split nut principle as early as 1878 for the purpose of quickly opening up and allowing the sliding end of a threaded shaft to clamp down on it so that afterward if you want, you can tighten it with a fine movement.

I also call attention to the difference of the structure of Birch and Johnson, to the effect that the green collar is not truly slideable, because in this case the green collar has threads on the inside and these red nut segments also have threads on the

(Testimony of George B. White.)
outside, so instead of a sliding collar, the collar is threaded, turned around for the purpose of pushing the segments of the nut together.

Q. Now we come to Michelin, January 26, 1904, the patent number being 750,675. What is that device for? It is described if I may read it, as a "nut for safety bolts, air valve caps, [161] or other analogous purposes." You have examined that, Mr. White; do you have analogous parts to the Johnson patent in the Michelin patent?

A. First, I wish to state, Your Honor, that that is only a reproduction of the first page of the drawings of the safety bolt. In the patent there is another page in which there are certain views which shows the application of that to valve caps for quick adjustment of the valve caps.

This particular structure shown in the enlargement was a safety bolt of the old-fashioned tire where it was necessary to clamp the tire to the rim. This lower portion represents the tire casing "C" or the beads of the tire, and "E" is the rim of the tire. They used to provide a washer on the inside or a head for the bolt, and then a safety bolt was extended to the rim, and after the tire was so assembled then they wanted to have a safety arrangement with a quick engagement of this nut with the bolt. For that purpose they provided a purple head on the nut, which is solid.

Q. Now, wait a minute; you don't mean on the device it is purple, but you have indicated it by a purple collar in your color scheme?

(Testimony of George B. White.)

A. That is right; provided with a head which I colored purple on the drawing, from which extends integral resilient fingers, four of them, which are colored yellow, the lower ends of which are formed into the split or segmental nuts [163] colored red. On the outside there is a green collar which can be slid up or down. When it is in the position shown in Figure 3 or Figure 1, then it has a quick adjustment which just slid down on the bolt, and then the final tightening or fine adjustment to the point of Figure 4. The collar—the green collar is pushed down over the red nut segments to push them together into engagement with the blue bolt there and then thereafter the whole nut with the collar can be turned for the purpose of the fine adjustment.

That is about the earliest example that we could find for the showing of the split nut principle with integral resilient fingers for the purpose of quick engagement with a bolt when it takes too long to screw the whole length. These bolts had to be long, the patent states, and the patent also states in order to save time while screwing that nut on a bolt the whole length of it, this invention was conceived at that time with resilient fingers and the split nut for the quick engagement and then the tightening upon final engagement.

Q. The tightening up is done by what method?

A. By turning of the green collar.

Q. That is called "H" on here.

A. That green collar has little projections on the inside which go into the slits between those fingers

(Testimony of George B. White.)

so that when the green collar is pushed down in that position, then by turning [163] the collar by these wings the fine adjustment can be accomplished.

Q. I have an aluminum casting here with a collar device on it with wings on it prepared as a model for the assistance of the Court and jury in this case.

Can you state whether that device that you have in your hand—I have shown it to the opposing counsel—correctly represents the Michelin patent as represented by the drawings down to the point that I am indicating now; that is where the red inner member reaches a broader structure?

A. Well, the inner member is blue.

Q. Yes?

A. It correctly represents the structure up to the point of that "G" part.

Q. Right there?

A. Yes, that structure.

Q. All right. Now part of the inner side of what represents the collar in this device you say has the ridge that engages with those slots. Is that shown on the model there? A. Yes.

Q. Now, Mr. White, taking this device,—I have left this member on here just to divide the shaft for some purposes I will develop later—that sliding represents the fast adjustment on the Michelin device?

A. That is right. That is exactly the same adjustment as [164] you would accomplish with any

(Testimony of George B. White.)

split nut: when you open it up you allow it to drop down.

Q. Taking the split nut, the internal threading is shown at the lower portion of it there; is that correct? A. That is correct.

Q. And that is what engages with the external threading on the inner member; is that correct?

A. That is right.

Q. And then in pulling the collar down you tighten it and then you get no slide but you can make a slight adjustment?

A. It is positively locked into the threads thereafter; the only way you can have relative movement between the two is by turning the nut which became solid on the shaft.

Q. I have here threaded to the same size inner member, this; what does that represent to you, that collar?

A. This represents substantially the structure shown in the Johnson patent.

Q. What part of the Johnson patent does it represent now?

A. Just the part shown in court, one without the inner member. It shows a portion of the tubular member which is marked purple; it shows the yellow fingers and the red nuts and the green sleeve.

Q. Compared here, this represents what structure on Figure 3?

A. The collar you have in your hand is the green collar 24 on Figure 3. [165]

(Testimony of George B. White.)

Q. And the longer device with the split fingers represents what portion here?

A. The top represents the part bearing the numeral 16 colored in purple, and the split fingers colored in yellow bearing the numberal 20, and the lower portion of the red segmental nut or split nut portion is 21.

Q. Will you fit the part I have handed you last on to this same inner member, the part I mean that you say substantially represents the Johnson patent?

A. Well, I can slide it on as it was demonstrated and can pull the sleeve down over it, and thereafter the sole engagement is the engagement between the threads for screwing it up or down as it may be required.

Q. The center piece is merely a divider?

A. The center piece is a divider.

Q. Leaving that center piece out, does the right hand member, the one with the back called Michelin on it, substantially represent the Michelin patent insofar as it represents the clutch portion and the adjustable portion, and the left hand the moveable member of the Johnson patent; the former in 1904, the latter in 1952? A. That is correct.

Mr. Bronson: I would like to have this marked as an exhibit. Let me think a minute. We will mark it all as one, unless counsel for some purpose of his own would like the [166] different parts separately marked.

Will you mark that as an exhibit in evidence?

(Testimony of George B. White.)

(Whereupon cast aluminum model illustrating the Michelin and Johnson patents was received in evidence and marked Defendant's Exhibit P.)

Mr. Bronson: Q. While the Clerk is attending to that matter, the Michelin patent hasn't this smooth-surfaced part at the upper end of the inner member? A. That is right.

Q. Can you tell the jurors among the different devices that you have reviewed thus far, not found or included by the Patent Examiner, that smooth-surfaced connection for the purpose of avoiding side wobble is found in how many of them, giving them by name?

A. I found that smooth-surfaced member in the Uecker patent, a scaffold jack, Number 2,203,114.

Q. Just a moment, please. What is the number of the Uecker patent? A. 2,203,114.

Q. To save me wrestling with these heavy exhibits, that is the one represented on a drawing similar to this (showing)?

A. That is right; it is a reduced photograph.

Q. Will you point with your pointer so the jury can see where the bearing surface is?

A. The bearing surface is along the line here marked 15. It [167] is described in the patent as far as function goes, on the first page, line 26, which states that, "The collar 27 thus cooperates with the sleeve 15 to form a unitary rigid column, and prevents wobbling of the screw 14 within the post."

(Testimony of George B. White.)

Q. On what other patent did you find that portion?

A. I found a portion not identical but for the same purpose in the Burns patent, which is——

Q. Burns? A. Yes.

Q. Again to save additional time——

A. The Burns patent has on the top of the blue screw shaft a part which bears the numeral 6 and which is a head on the top of the screw member, which is described in two places in the patent. On page 1, lines 64 and 65 it says,

"* * * the latter" (referring to the reins 5) "having flat inner faces as in Fig. 5 to form a slideway for bar 6."

And from page 2, line 6, the sentence beginning there states,

"Thus, a non-rotatable connection is provided between the swivel bar and bar 6" (bar 6 is the member I pointed to) "slideable between reins 5 whereby the swivel bar is prevented from whirling or rotating under the twisting and untwisting [168] tendency of cable 'C'."

Q. Is there another patent that we do not have enlarged that shows the slideable aspect of the top of the inner member?

A. Yes, I have——

Q. Will you detach that?

A. I have the Moore patent here which shows a collar 19, on the top of which is described in the patent, page 1, line 31:

"Preferably element 19 has a snug sliding fit

(Testimony of George B. White.)

within leg member 6 and cooperates therewith for guiding and bracing the leg members 6 and 7."

However you should explain—we should explain that that leg number 17 is not threaded.

* * * * * [169]

Mr. Bronson: Q. Will you refer to the slideable portion by number?

A. 19 is the number.

Q. And the tube in which it operates is numbered what?

A. Six.

Mr. Bronson: Is this visible to the upper row (showing)?

Q. This is not screw-threaded?

A. No, it is not screw-threaded and it shows a wedge-type of arrangement.

Q. At what number?

A. The wedge is at number 14, and it is a split wedge supported on a grooved base 11, and on 6 there is an external nut which can be turned in such a way on the outside of tubular member 6 as to pull up the wedge and thereby wedge against—frictionally against the leg 17 to hold it in that adjusted position.

Q. From what portion were you reading those two excerpts which you made?

A. I read one, only one excerpt on page 1, line 21, the [170] sentence beginning "preferably."

Q. "Preferably, element 19 has a snug sliding

(Testimony of George B. White.)

fit within leg number 6 and cooperates therewith for guiding and bracing the leg members."

A. That is right.

Q. That is the single reference you made?

A. That is right; the same purposes.

Mr. Bronson: The number, for the jurors, that the witness referred to on the Moore patent, Exhibit N, as a slideable member is numbered 19 here attached to the leg, which is number 7, and sliding within the outer member here, with the differences noted here in a wedge-shaped locking device.

Q. Mr. White, this device is exhibited for what purpose, then—that is the Moore?

A. It is exhibited for the purpose of showing the existence of the part 17 of the Johnson patent long prior to the application of Johnson for the patent, and for the same purpose as far as guiding and bracing are concerned.

Q. Is there any distinction in the way it operates from the operation of the one claimed in the Johnson patent? A. Not at all.

Q. Is there any difference in effect that it gives?

A. None at all; it is to accomplish the same result, to prevent the wobbling of the inside member.

Q. To shorten this matter down, if I can, let me have the [171] pointer. Now the split nut features you find in the Michelin patent and in what other patents among those, if you can name them briefly, —the split nut in combination with a sliding collar to lock the nut?

A. I find the split nut principle in combination

(Testimony of George B. White.)

with a sliding collar in the Countryman patent, which was the automobile jack with telescoping parts. I find the split nut principle between telescoping members on the screw clamp of Taylor as between the clamp screw and the split nut with the bushing on it. I find the split nut principle also in telescoping parts in Michelin which is shown there on the chart. The split nut principle is shown in a slightly different form also in between the telescoping parts in those temper screw patents of Burns and Hinckley, and the same split nut principle with a sliding sleeve is shown in another kind of device in the caliper.

Q. Without describing them in each case but just giving us the name of the patent—you have done that now—for the split nut, in what one just by name, do you have the coarse and fine adjustment accomplished by means of a clutch of this type?

A. The coarse and fine adjustment is present in the Countryman——

The Court: Can't you just give the name?

Mr. Bronson: Q. Just say Countryman, and so on. [173]

The Court: Can't you give the name without stating it all over again each time?

A. Countryman, Taylor, Burns, Stevens, Hinckley and Michelin.

Mr. Bronson: All right, now I want to pass this Exhibit No. P to the jury, the one that contains as I face it now or you would be facing it, if you will excuse my back, on the right is the clutch

(Testimony of George B. White.)

member of the Johnson patent and on the left the one with the wing turning member here is the Michelin which is on the board. If the jury can quickly pass that, taking time to observe the similarity of the method, I think I can go ahead with this without distraction. It really is more for the record so we show the reference.

Q. Do you have the Mapes soft copy there, please? A. Yes.

Q. I am referring now to what is referred to as Defendant's Exhibit M, patent to Mapes May 21, 1907, Yoke and yoke-screw. Will you describe the operation of the Mapes patent?

A. There is merely another illustration of the so-called temper screw. In this case the split nut is made in two halves, and there is a wide collar which surrounds them with a set screw on the side. When it is screwed in it holds these two nut sections together; when the screw is unscrewed, as shown in this Figure, in the last figure on the drawing, then the arms spring apart and the nut segments separate, and release the screw so as to allow quick adjustment. Then when [173] the screw is screwed as shown in Figure 2 then the nut segments are in contact with the screw and the only adjustment is by turning the screw.

Q. So that is an additional patent on which you find a coarse and fine adjustment?

A. That is true.

Q. And on which you find internally and externally threaded members brought together by a

(Testimony of George B. White.)

clutch device, in this case a collar that does not slide but is operated by a set screw?

A. That is true.

Q. Mr. White, referring to the practice in the Patent Office when a search is made, does a search disclose applications for patents that have not been issued?

A. No, the applications for patents are kept secret in the United States Patent Office and are not available to a searcher, to the public.

Mr. Bronson: I have concluded the direct examination.

Cross Examination

Mr. Mellin: Q. Mr. White, the search that you conducted through the Patent Office, that was as thorough as you could make it; wasn't it as full as you could make it?

A. No, I was in Washington on other business, and I could not set aside more than two half-days in the Patent Office to [174] make the search. On all the subject classes and classes that I was to examine, there were roughly 5400 patents, and I examined approximately—I didn't count them—I would judge between 800 or a thousand.

Q. You went through the screw jack art pretty thoroughly though, didn't you?

A. The screw jack art?

The Court: What is that?

Mr. Mellin: You were talking about automobile jacks, Your Honor.

The Witness: Automobile jacks I didn't. The

(Testimony of George B. White.)

reason was it is a very, very large art, and I gave up hopelessly in the search room and I went up to the Division and talked to the primary examiner, and he called one of the assistant examiners and the assistant examiner told me that the device was old but he cannot put his finger on it. So he referred me to about four sub-classes, each of about 50 patents, which I looked over, and didn't find anything. And I asked the examiner to call up my Washington associate if he could remember the patent he told me he had in mind. After I came back to San Francisco my associate advised me that he was called by the examiner and he found the patent number, and it was the Countryman patent.

Mr. Mellin: Q. The Countryman patent?

A. Yes. [175]

Q. So you are satisfied, are you, Mr. White, that as far as the automobile jack art is concerned that His Honor was speaking of this morning, the Countryman patent would be the closest to the plaintiff's structure in that particular art?

A. That is the closest I could find, but I must add this: this sort of split nut principle runs over a number of classes in various applications where it did not form part of the invention, it was merely incidental to the structure, and therefore it doesn't show in the classification and it is unclassified. There is no single classification for this particular telescopic structure as such.

Q. As a matter of fact, split nuts as such are in

(Testimony of George B. White.)

all the arts as you have shown here; isn't that true?

A. Yes; in many cases just incidental to some other part.

Q. In other words, taken by itself a split nut is as old as the mechanical arts itself; isn't that correct? A. That is correct.

Q. And that is generally true of all machines, isn't it? That taking a part isolated from its environment and in itself, it is substantially old in some art; isn't that correct?

A. I couldn't say for all machines; I didn't make a search on them. I can merely say that in many instances when you run into a problem and you are looking for a device to solve it, in many instances you can find it.

Q. Just a minute, Mr. White. I think you didn't understand [176] my question. I said, you take practically any machine and take one part off of it and disassociate it from its environment and you can usually find that part old in some other machine, some other art; isn't that true?

A. Yes, all machine elements are probably old.

Q. That is what I thought. You find this split nut in tire gauges, for example?

A. This was not a tire gauge.

Q. Tire stem filler?

A. No, that is a safety bolt to hold the casing in the rim of the tire.

Q. I am talking about the Michelin patent and how that works; isn't it applied to an air valve tire stem? A. That is right.

(Testimony of George B. White.)

Q. And the purpose of that nut was not for the purpose of the patent in suit; the purpose of that nut was to enable it to come down and clamp the tire gauge to the tire or to the rim?

A. I can read to you the purpose of it.

Q. Let's not read it. You understand it. Let's answer yes or no.

Mr. Bronson: Wait; that is too much guidance. He is going right to the patent.

The Witness: I can read the purpose of the nut from the patent. [177]

The Court: Irrespective of what it says there——

The Witness: The purpose of the nut was——

The Court: Wait a minute, Mr. White. So we don't get into a lot of long arguments between the two lawyers, he just wants to know in a practical way so this jury can understand without reading from the patent, whether generally speaking that is a fair statement.

The Witness: It is not. The purpose of the nut as described in the patent was to avoid the necessity of a long threaded—screwing of the nut on a long stem screw shaft, and to have a quick and fine adjustment the split nut was developed to be put on.

Mr. Mellin: Q. In the Michelin patent, however, that I hold the pointer to, this is the valve stem of an air valve for the tire?

A. It is not described in the patent as a valve stem; it is a safety bolt to hold it in——

Q. But it would be of the order of a valve stem

(Testimony of George B. White.)

in size, wouldn't it, Mr. White, in proportion to the drawing?

A. May be; it is not stated in the patent.

Q. And the purpose of the nut was to come down and form the clamp between the elements to which I point, and that was its purpose; isn't it?

A. That is true.

Q. And there is no suggestion in that patent, is there, of [178] having that threaded bolt act as a supporting leg for anything, is there?

A. No.

Q. There is no suggestion in that patent of having anything to maintain that threaded bolt from wobbling in a tubular leg of a scaffold, is there?

A. No.

Q. There is no suggestion in that patent of anything provided in there so that you can screw that bolt out of a nut so it would drop, is there?

A. It is called a safety bolt, and the main object was that after you screwed it on it wouldn't accidentally get loose.

Q. If you wish to evade, let's point this out——

A. I didn't wish to evade.

Mr. Bronson: Wait a minute. I protest. All right; handle it yourself. There is the trouble of having an attorney for a witness, Your Honor.

Mr. Mellin: Q. As a matter of fact, Mr. White, there is no suggestion at any time that you would rotate the threaded member that I point to, which is "A" in the drawings—there is no suggestion at any time that you rotate that to effect the adjust-

(Testimony of George B. White.)

ment, is there? A. That is correct.

Q. You wouldn't say, Mr. White, would you, that the device [179] of the Michelin patent taken as there shown has the same mode of operation and accomplishes the same result as the adjustable leg of the scaffold Exhibit 8, would you?

A. I say it has exactly the same mode of operation. If you slide it on the end of a tube it would accomplish the same result, as demonstrated by this model passed around to the jury.

Q. You just told me, I understand you to say, that it had no provision to keep it from being screwed out of the leg and that it had no provision for preventing wobbling, didn't you?

A. The question of preventing wobble is old in the art, as I showed; but as far as screwing is concerned, you can take that Michelin patent, take that purple-colored collar on the top, weld it to the end of that scaffold tube in the proper size and it will operate exactly in every respect in every part as the split nut operates on the Johnson scaffold.

Q. In other words, the split nut in each instance would always operate the same if first you got the idea of welding it on to the bottom of a scaffold?

A. I didn't get the idea; that is obvious to me as an engineer and a draftsman.

Mr. Mellin: Will you read the last question?

(The Reporter read the question.)

Mr. Mellin: Q. Will you answer it? [180]

A. I didn't get the idea; it is obvious to me as a draftsman and an engineer.

(Testimony of George B. White.)

Mr. Mellin: Will you read the question again?

(The Reporter again read the question.)

A. I didn't get any idea first.

Mr. Mellin: Q. I didn't ask you about the idea. Wouldn't they operate all the same if once that was known, the split nut would always operate the same?

A. A split nut would always operate the same no matter where you put it.

Q. And there are lots of split nuts shown in all of these other combinations in these patents?

A. The split nuts, most of them are shown in exactly the same combination as the Johnson patent.

Q. Would you say then that—you gave an opinion—that looking at this tire device in Michelin, would you say then, Mr. White, that having that in front of you, that the device of the patent in suit and its features and its functions would be obvious to you as an engineer? Is that what you were telling us?

A. I would,—if you are interested in my opinion, I would reverse it; if I ran into the problem of a quick adjustment instead of the old-fashioned screw adjustment for legs of the scaffold and I needed a quick adjustment, I wouldn't have to search the mechanical books, I would know that the [181] split nut principle will definitely accomplish the purpose.

Q. I don't know whether that is an answer or not, but I guess it is the best one I will get.

Mr. Bronson: Is that a question?

(Testimony of George B. White.)

The Witness: Yes, that is the best one you will get.

Mr. Mellin: Q. You spoke of the Uecker device; is that what you called it?

A. I pronounced it Uecker; I understand what you are referring to.

Q. Uecker. As I understand it, your testimony this morning was that at no time would the leg 23 in blue fall out of that leg, is that correct?

A. Not as long as it was screwed in the bushing.

Q. But in adjusting the scaffold you turn this screw 23, don't you, to adjust it threadedly up and down? A. That is true.

Q. And you could thread it right out of the leg if you kept turning it?

A. That is right.

Q. You don't find that in the patent in suit, do you? A. The patent in suit provides——

Q. Can you answer that yes or no? Do you or don't you? A. What don't I find?

Mr. Mellin: Read the question.

The Court: Read the question. [182]

(The Reporter read the question.)

A. What don't I find in the patent in suit?

Mr. Mellin: Q. Does the patent in suit have the ability to be threaded right out of the leg?

A. The patent in suit has the ability when the nut is engaged to be threaded as far as the collar 17 and the collar doesn't allow it to be threaded any further.

(Testimony of George B. White.)

Q. In other words, you can't unwind this leg out of the bottom of the scaffold?

A. No, just like you couldn't unwind anything that you had a head on, on any screw; after the head reaches the end of it, you can't unwind it any further.

Q. The Uecker patent doesn't have any provision for coarse adjustment?

A. No, the Uecker patent only has fine adjustment.

Mr. Bronson: Let the record show you are pointing to Uecker 498.

The Court: I think you had better do that.

Mr. Bronson: There is quite a little difference. Mr. Uecker corrected that a little later.

The Witness: This was the Uecker file wrapper reference to which my answer applied.

Mr. Mellin: Q. The Patent Office in its passing on the patent in suit had before it devices with split nuts, didn't it? [183]

A. One device, Prowd.

Q. So it had before it a device with a split nut?

A. It had, but your argument in the file wrapper against that was that it was not telescoped.

The Court: Mr. White, you are arguing.

The Witness: Excuse me.

The Court: He just asked you a question.

The Witness: The only spit nut device the Patent Office considered was the Prowd device.

The Court: There is no question before us; you

(Testimony of George B. White.)

were asked a question as to whether or not the Patent Office had—as to what the Patent Office had before it.

Mr. Mellin: Q. It was a patent showing a split nut for quick release of a threaded engagement with a second male member?

A. That was the Prowd patent, yes.

Q. And that split nut was contracted and expanded by sliding a sleeve; isn't that correct?

A. That is true.

Q. And the Patent Office considered that in passing on the patent in suit; isn't that correct?

A. That is the only split nut the Patent Office considered.

Q. Now the patent to Athans. That patent is merely a telescopic joint in which by tightening it you can effect a frictional connection as distinguished from a threaded [184] connection between two telescopic tubes; isn't that correct?

A. If I may answer it in my own way, it has an outer tube and an inner shaft which telescopes in it, and it has a clutch means to clamp the two members together fixedly. I mentioned that because of the description of the Johnson patent of the general aspects of the invention.

Q. Let's make it more simple. The connection between the two tubes when they are connected together is purely one of friction, isn't it?

A. Purely frictional; that is true.

Q. There is no mechanical connection at all?

A. That is a mechanical connection, frictional con-

(Testimony of George B. White.)

nection; there is no screw connection between them.

Q. And the sleeve in the Athans device does not slide up and down, does it?

A. No, it is screwed up and down.

Q. So to loosen one piece of the telescope from the other, you turn the sleeve, and doing it the other way you tighten it?

A. That is right. That is a conventional method.

Q. In that respect that is the way it is comparable to the device of the patent in suit?

A. I compared it to the patent in suit in the statement on page 1, line 21, which stated:

"In its general aspects, the invention contemplates a telescopic supporting leg having cooperable clutch members which may be readily disengaged from one another to permit movement of the telescopic members with respect to each other in effecting variations in the length of the leg structure."

And every one of those elements in the general aspect are present in Athans.

Q. But, however, it doesn't have the ability for fine adjustment? A. That is true.

Q. And it doesn't have, in the sense as distinguished from frictional contact, it has no mechanical contact between the two legs?

A. Apparently your definition and mine of mechanical contact are not the same, so I prefer to say it has no mechanical connection.

Q. Would you say that the mode of operation of this device is substantially that of the device of the patent in suit?

(Testimony of George B. White.)

A. I would say that the general aspects of extensibility are the same, and I would say that it does not have the threaded fine adjustment.

Q. You would also say, wouldn't you, that it does not have an interiorally threaded nut which is operated by sliding the sleeve to effect threaded engagement between the outer and inner tubes?

A. That structural difference also exists. [186]

Q. And any function flowing from that structure is likewise absent in Athans?

A. That is true.

Q. As a matter of fact, you as an engineer wouldn't use the legs of Athans for a scaffold?

A. I would use them on a table, and my understanding is——

Q. Not what your understanding is; I am asking, would you use them on a scaffold?

A. No, not on a scaffold; on a table I would.

* * * * * [187]

Mr. Mellin: Q. Turning to the Uecker patent number 2,203,114, would you say that that has a mode of operation of the device of the patent in suit, Mr. White?

A. Not the total mode of operation.

Q. It has missing, hasn't it, the ability to make the rapid adjustment by sliding the sleeve up?

A. That is true.

Q. In other words, that device in principle is this device, isn't it, Exhibit 12 as far as adjustment is concerned?

A. In principle it is not the same device, because

(Testimony of George B. White.)

in Exhibit 12 the leg can fall out, while in the Uecker device it is frictionally held in place.

Q. As far as adjustment is concerned?

A. As far as adjustment is concerned, it is the jack principle the same as 12.

Q. In the Countryman patent that you spoke of this morning, you only described to the jury three views of it; that is correct, isn't it?

A. I didn't understand you.

Q. You only described to the jury Figures 1, 6 and 7, which is only a portion of that; isn't that correct? A. That is correct.

Q. You didn't tell the jury, did you, that to make the fine [190] adjustment a complex auxiliary mechanism was used to advance the blue screw up and down, did you?

A. No; I stated that there were other mechanisms for turning it.

Q. I think you did say to make the fine adjustment you would turn the purple part with these pawls—the patent calls these red things "pawls"; isn't that correct? A. That is correct.

Q. You would turn this purple part and that through these pawls would make a fine adjustment; you recall that testimony, don't you?

A. That is correct.

Q. As a matter of fact, if there was a heavy load on top here, such as an automobile on top of 26, would you explain, please, how you could turn that purple part to effect that fine adjustment?

A. You couldn't.

(Testimony of George B. White.)

Q. Isn't it a fact that in the patent to make the fine adjustment they have a gear and a separate nut at a point below which you jacked in the usual fashion to make the fine adjustment?

A. That is true. But may I add at this time, in order that there is no misunderstanding in the mind of the jury, that fine adjustment was not for the relative movement between the screw and the sleeve.

Q. As a matter of fact, that Countryman patent likewise made [191] no provision for preventing the screw from being screwed out of the nut or those pawls, did it? A. No.

Q. And it made no provision to stop the wobble of the leg if it were used in a scaffold? I didn't mean to foreclose you from looking at that view, Mr. White.

A. I have the patent here. No provision; if it wanted to wobble, it could wobble.

Q. That is correct. In the patent which is up there now, the Taylor patent of 1903, that was brought out by you merely to show another application of the split nut that was collapsed or extended by a sleeve; isn't that correct?

A. That is right.

Q. And that is its pertinency here?

A. That is correct.

Q. You didn't mean to intimate that it had all of the functions and mode of operation of the patent in suit, did you?

A. I mean to say it had.

(Testimony of George B. White.)

Q. Now you have before you the patent of Burns, 1,181,734. That is an oil well tool, isn't it?

A. That is right.

Q. It has no sliding sleeve?

A. It has a yoke or reins, number 5, which relatively move up and down. Oh, you mean the green sleeve? [192]

Q. The green sleeve. That isn't a sliding sleeve?

A. That isn't a sliding sleeve.

Q. You used a set screw?

A. You used a set screw on the sides for the purpose of releasing the fingers.

Q. In that patent, when you read it, you discover that there are two sides of this yoke and it has just like two fingers sticking up, hasn't it, by the shape?

A. They are flattened for the purpose of forming a base for the bar 6.

Q. And the bar 6 slides up and down?

A. That is right.

Q. And the white objects that I am now pointing to, those are in back of it, isn't that right?

A. That is right; the two arms are not tubular.

Q. In other words, if that blue screw wobbled this way, in the way I am putting the pointer, this could wobble right out of there, couldn't it?

A. If it could, yes, but it doesn't.

Q. And that would be true of the Hinckley device likewise, isn't that so?

A. That is true.

Q. The Hinckley patent that I am referring to

(Testimony of George B. White.)

is number 135,988. Now about the Stevens patent, Mr. White. That was cited or referred to by you to show another application of [193] the split nut in mechanics?

A. That is right, as between telescopic members horizontally that telescope.

Q. Would you say that the device of the Hinckley patent had the same mode of operation and produced the same results as the device in the patent in suit?

A. So far as the clutch is concerned, yes.

Q. Just that one part? A. That is right.

Q. And that is true of all of those devices that you referred to that had the split nut; isn't that so?

Mr. Bronson: I am going to object to that; it is too broad a question.

Mr. Mellin: Let him qualify his answer if he wants to.

Mr. Bronson: It is a buck-shot question.

The Court: I will overrule the objection.

A. It is not true as to all the devices.

Mr. Mellin: Q. As to which ones isn't it, Mr. White?

A. It is not true as to Countryman and it is not true as to Michelin.

Q. Those two? A. Those two.

Q. By the way, Mr. White, of all of these patents that you have brought before us and explained to the jury, which one in particular do you think is most like the device of the [194] patent in suit in construction and in mode of operation?

(Testimony of George B. White.)

A. So far as structure is concerned, the Michelin patent shows all the elements of the clutch mechanism; and so far as operation as a leg is concerned on the general aspects, as I stated before, the Athans patent shows the general adjustment with a different clutch mechanism. Countryman on the jack shows every element of the combination.

The Court: Q. What did you say just then?

The Witness: Countryman on the jack—the Countryman automobile jack shows all the elements of the combination; shows the telescopic outer element, the tube; shows the inner shaft and shows the fingers, and shows the nut on the end of them, except that the fingers are not integral and resilient; they are pivoted pawls instead of resilient fingers. And the structure of the clutch is well shown in the Taylor patent which however shows the fingers pivoted and pushed out by a spring instead of having them integral.

Mr. Mellin: Q. Which patent is that?

A. That is the Taylor patent.

Q. You say, as I understood your testimony, as far as construction is concerned, that the patent to Michelin, which was the tire rim clamp, that in your opinion was the closest to the patent structure as far as construction is concerned?

A. That has the identical structure of the clutch.

Mr. Mellin: Could we have the recess now, Your Honor? [195]

The Court: Yes. Before we do that, you did

(Testimony of George B. White.)

make an exception to the last statement, though, didn't you?

Mr. Mellin: He added to it, Your Honor; he said that that in construction and another one in operation.

The Court: No, no, that isn't what I meant. In connection with Michelin you said it was identical but at the very end you said except as to something.

The Witness: Except it hasn't got the long collar on the top of it; it has only a short collar on the top in side the long tube; otherwise it is identical.

The Court: We will take the afternoon recess now.

(Short recess.)

Mr. Mellin: Q. Concerning the Birch patent about which you testified, which is number 210,235, that is, I think you testified, a ramrod gun cleaning device? A. It is a gun wiper.

Q. That hasn't any ability for adjustment at all, has it? A. That is right.

Q. In other words, while that is important, it is another application of this old split nut?

A. The reason I applied it was because the split nut structure in it in general was very close to the device of the clutch structure shown in the scaffold.

Q. In the patent in suit? A. Yes. [196]

Q. It differs from it, however, in this respect: the sleeve "F" which is in green, is a threaded sleeve which you thread on a taper to expand or contract the nut; isn't it?

(Testimony of George B. White.)

A. That is my recollection.

Q. In the scaffold it is a split nut?

A. That is correct.

Q. There wasn't any intention on the part of Birch to have any adjustment between the two parts telescopically? A. That is true.

Q. The Pumphries specification merely shows a telescopic leg for a tripod; isn't that correct?

A. That is right.

Q. And it merely screws two parts together when you get them in an extended position?

A. I don't find that reference; that is a file wrapper reference.

Q. I mean that is the point of it, isn't it?

A. That is right.

Q. Then with reference to the Prowd patent, that shows another application of the spit nut; is that so? A. Yes, on a pipe coupling.

Q. And the nut in that Prowd patent operates in a fashion somewhat similar with respect to the sleeve and split nut to the split nut that is one of the elements of the patented device; isn't that correct? [197]

A. It is different in two main respects, if you wish me to distinguish.

Q. I didn't hear your answer, Mr. White; I'm sorry.

A. It is different in two respects.

Q. And those respects are what?

A. One is that those fingers are loose, held together by ring 12 on the pipe 5; and the other re-

(Testimony of George B. White.)

spect is that the two pipe sections, 5 and 7, are in an abutting relation end to end and do not contemplate any adjustment at all.

Q. In the Countryman patent you would find the same first criticism, wouldn't you, that the parts of the ends are independent and pivoted on pins; isn't that correct?

A. When they are pivoted on pins they are pivoted in the telescopic member, whereas in this case they are entirely independent of the pipe 5.

Q. But in the Countryman patent the pawls 28 which are in red are pivoted on pins 29?

A. They are pivotally fixed to the sleeve 27.

Q. And they are not formed as part of the fingers made as an integral part of the tube, are they?

A. They are not integral.

Q. And they are not welded or fixedly secured integrally with the tube end?

A. They are fixedly secured because the pivot cannot move with respect to the sleeve—purple sleeve 27. [198]

Q. With respect to the Mapes patent number 854152, there you do not find a sleeve, do you, which slides up and down?

A. That is right; I find a sleeve with a set screw, pushing together the segments.

Q. In other words, when you want to clamp the lower part of this big yoke to the screw you turn a crank?

A. Yes, but the crank has a screw which is threaded into one part of the collar, and that collar

(Testimony of George B. White.)

surrounds one of those sections, and the other set screw pushes it together.

Mr. Mellin: What I have my finger on is the yoke which is split (indicating). There is a fixed collar, and you crank this screw to expand it or contract it. This is the Mapes patent. Here is the yoke. Here is the fixed member. It has a screw crank to crank the two together and let them expand (exhibiting to the jury).

Q. The Moore patent which counsel showed to the jury, that also does not have a fine adjustment in the manner of screw threads, does it?

A. That is true.

Q. It doesn't have a sliding sleeve either, does it?

A. No, it has a threaded nut on the outside of the telescoping tube.

Q. In other words, when you want to let it go you have to wind that nut?

A. You have two releases. Winding the nut would let it go. [199] That reference, if I may say, that reference was not for the purpose of showing the structure in that finger structure; it was showing this unthreaded portion which is used in the top of the screw of the Johnson patent marked 17; that the same device was already used on unthreaded tubes as shown in Moore exactly for the same purpose as it is used in the Johnson patent.

Q. For many many years if you had two telescopic parts you made the tube fit rather snugly

(Testimony of George B. White.)

just like a telescope and one doesn't wobble with respect to the other, does it?

A. That isn't the purpose of the Moore patent; but your answer is true in general except in the Moore patent there is a special head formed in the same manner as the head 17 and the screw 17-A of the Johnson patent.

Q. It isn't formed there in combination with a threaded part which cooperates with a sleeve in the Moore patent?

A. That is true; the lower portion of the Moore patent is smooth; it is not threaded.

Mr. Mellin: That is all.

Mr. Bronson: I want to put in evidence, Your Honor, the large photographs as a single exhibit, the one on the right.

(Thereupon the photographic enlargements of drawings referred to were marked Defendant's Exhibit Q in evidence.) [200]

Mr. Bronson: And then the Johnson patent with the corresponding colors as the next in order.

(Thereupon colored chart of the Johnson patent referred to was marked Defendants Exhibit R and received in evidence.) [201]

* * * * *

VICTOR W. MENG

was called as a witness on behalf of the defendant, who having been previously duly sworn, resumed the stand and testified further as follows:

The Clerk: Please state your name again, Mr. Meng, for the record.

The Witness: Victor W. Meng.

Direct Examination

Mr. Bronson: Q. You have given your address and you have stated that you are president of the defendant company; is that right?

A. That is correct.

Q. I believe you said you had been employed with them for some thirty-eight years?

A. That is correct. [202]

Q. Does the company that you work for as president and the defendant here limit its scaffold business to aluminum scaffolds?

A. No, sir, we have all kinds of scaffolding.

Q. Metal scaffolding?

A. Metal scaffolding.

Q. That includes steel? A. Yes, sir.

Q. And turning to the matter of steel scaffolds, how long have they been in use?

A. Well, steel scaffolding of one type has been going back to about 1926, but the steel scaffolding of the sectional type came out around 1936—'35.

Q. And the portable type, how long have they had the portable type? That would be with the casters so that you can move it.

A. That came on around '35 or '36 in the sec-

(Testimony of Victor W. Meng.)

tional scaffolding, and of course in the other type prior to that time.

Q. When did aluminum, that is, scaffolding made out of aluminum tubing, first come into use?

A. That came into use after the war.

Q. And that would be some time——

A. Around '47—'46 or '47.

Q. 1946 or 1947. Had any rapidly-adjustable scaffolding ever been applied to steel? [203]

A. No, it isn't practical to apply that to steel because of the fact that the steel is too heavy.

Q. You observed Mr. Johnson demonstrating to the jury the extension of the legs to different heights. A. I did.

Q. Can that be done with steel by a workman?

A. If the scaffold is only that high it probably could, but normally a scaffold is much higher. Then that weighs a lot more. This particular scaffold is very small.

Q. Did you ever know of an adjustable unit such as represented by Mr. Johnson's being used on a steel scaffold?

A. The adjustable procedure in connection with steel scaffolding was adopted in 1937.

Q. What kind was that?

A. That was a long screw somewhat like the Uecker patent with the unfinished head on it in order to stiffen up the scaffold at the top.

Q. You mean by that a smooth inner bearing surface?

A. A smooth portion at the end of the threads.

(Testimony of Victor W. Meng.)

Q. Mr. Meng, Mr. Mellin referred to that as the jack screw principle or screw jack, whatever it was; is that the type you are referring to?

A. That is right.

Q. That doesn't require a workman to do any lifting? A. No. [204]

Q. When aluminum scaffolding, tubular aluminum, came in, as you say, around 1947, that was the first type of extensible feature that was applied to that?

A. The same type as is shown in the steel scaffold.

Q. Mr. Johnson's patent application, according to the record, was in September 1947, and that would be the same year, according to your knowledge of this business, that tubular aluminum was used for scaffolding? A. Around that time.

Q. Take the scaffold as a unit, take a single four-legged unit scaffold, two or three or four tiers high, will you explain to the jury that various elements there are additional to any extension device similar to Mr. Johnson's that there are in any piece of scaffolding, sectional scaffolding?

A. First you have a caster at the bottom. That simply fits into the bottom of the threaded tube, which is a piece of aluminum threaded. It is a piece of tube. Then you get into your tube, of course, your threaded tube. The next separate piece is your frame.

Q. Consisting of what?

A. In this particular case it is a ladder frame,

(Testimony of Victor W. Meng.)

two of them, one on each side; you have your two cross pieces which are independent, and you have your platform, which is independent, and then you mentioned about going three tiers high. You would have three additional tiers of ladder frames [205] without any adjustment on the bottom. They would use sprockets in between them to hold the two pieces together. Then you would have——

Q. Is that a cross piece?

A. Then you would have your cross brace again and your platform or horizontal brace, and at the top of course you should have a guard rail.

Q. Are these scaffolds equipped with any separate ladder device in instances?

A. In the larger type scaffold, yes; there are scaffolds equipped with separate ladders. They would be in the square scaffold, six by six square.

Q. The multiplication of parts occurs as you extend your scaffolding upward?

A. That is correct.

Q. What is the lowest or simplest construction you have—a single tier, or are they higher than that for the simplest?

A. No, that I would say would be about the simplest you have.

Q. What would?

A. What you see right there.

Q. That is a single tier?

A. That is right.

Q. And then the extent they should have as a practical measure of the highest? [206]

(Testimony of Victor W. Meng.)

A. That is all depending upon your base area. You can only go so high before you get a tipping.

Q. Give the jurors some answer as to how high you can take them on a basis of that type of structure. What is that—two feet wide?

A. It is a two-foot wide. Ordinarily you shouldn't go more than four times your width under good safety practice. As soon as you go over, oh, two sections on that, you have to add to it sideways so that when a man pushes it it isn't apt to go over, or if he should roll that on a floor and he should go over a hole, that will tip over even though the leg won't fall out.

Q. I am referring you to an exhibit of the plaintiff, Number 16, which was identified by the witness then on the stand as a brochure of Patent Scaffolding Company. On the back in the lower left-hand corner there is a small print indication there. Does that tell you the date of the publication of this brochure?

A. Yes, that would indicate that this was printed in August of 1950.

Q. That was the one in which your attention was pointed to the caster and it was identified as not having the extensible device.

A. That is right.

Q. Do you know whether or not in 1950, if not earlier, you [207] were publishing the use of the extensible device such as is shown in the Johnson drawings here?

A. This particular caster on the bottom here

(Testimony of Victor W. Meng.)

with the sleeve was primarily used in magnesium scaffolding. When we first went into light metal scaffolding we came out with a magnesium scaffold, and the magnesium is not susceptible to the possibilities of aluminum. First off, we used it on the aluminum; but you will notice in the leaflet here it reads as follows:

"Using the adjustable caster illustrated below, a simple twist of the knurled nut gives the adjustment desired. Using the other type, the threaded caster leg fits into the leg of the bottom frame, and is held in position by a locking ring. Adjustments are made by releasing the locking ring."

Q. As of the date of publication of that brochure in 1950 were you using the type of adjustment that has been described to the jury here?

A. It wasn't exactly like that, but very similar. At that time we used a bottom section where we welded the adjustment to the frame.

Q. Did it operate in approximately the same way as to the locking ring and the clutch device?

A. Yes. [208]

Q. When did you first and under what circumstances put this type of leg on a Patent Scaffolding Company device?

A. I would say it would be early in 1950, or about the middle of the year.

Q. Under what circumstances?

A. The reason we put that on is because of the fact that certain government bids were coming through specifying a leg of this type with a quick

(Testimony of Victor W. Meng.)

sleeve action, so that in order to be able to bid on those requirements for the government we had to provide that type of leg, otherwise the bid would not be considered.

Q. Do you publish price lists for the trade of the prices yourself? A. Yes.

Q. You still sell steel scaffolding, do you?

A. We do; we still sell steel scaffolding of all types, including steel rolling scaffolding.

Q. Percentagewise only, approximately what part of your business is steel scaffolding?

A. The majority of our business is steel scaffolding.

Q. More than half of it? A. Yes, sir.

Q. Substantially more than half?

A. You are now talking about the portable rolling scaffold, I presume. [209]

Q. Of your scaffold business, what portion of it is steel as against aluminum? Does that make sense?

A. No. You mean scaffold business of the portable type?

Q. Well, take the portable type, yes.

A. Well, I would say that the steel scaffolding probably is, oh, six or seven times that of the aluminum. That would be an offhand figure.

Q. That is portable steel as compared with portable aluminum? A. That is correct.

Q. And do you have a business in non-portable scaffolding such as they use for permanent construction work on the outside of buildings?

A. That is correct.

(Testimony of Victor W. Meng.)

Q. You publish those price lists on the aluminum portable scaffold, do you? A. We do.

Q. I will show you here such a price list that you have provided me with. Can you say when that was published?

A. This particular price list was printed on May 1st, 1953.

Q. The prices do not remain exact, I take it; you change from time to time, do you?

A. Oh, yes.

Q. Does that price list show the price that you charge for aluminum portable scaffoldings with the adjustable leg and aluminum portable scaffolds that you sell without the [210] adjustable leg?

A. This particular price list shows that for both types.

Q. Will you state to the jury—I will have to look at it for just a moment. It shows prices for different sizes, 10-foot, 8-foot, 6-foot?

A. That is correct.

Q. Is that width?

A. That is the length in this particular type.

Q. Let us take the 10-foot first. What is the price for a section of aluminum portable scaffolding in that length without the leg?

A. Without the special leg it is $150.40.

Q. And with the adjustable leg what is the price? A. $160.60.

Q. And that differential of ten dollars and some cents contemplates how many adjustable legs?

A. That would contemplate four.

(Testimony of Victor W. Meng.)

Q. So that the differential in price for actual individual leg is approximately $2.00 and——

A. $2.55.

Q. $2.55. Take the next size and give us the same figures and state the differential.

A. On the 8-foot wide scaffold the price without the leg is $142.15, and the price with the leg is $152.35.

Q. And the differential? [211]

A. Is $10.20.

Q. And that contemplates, that differential, four legs?

A. That also contemplates four legs.

Q. What is the last size that you quote on that particular list?

A. The last size is a 6-feet long scaffold, ladder scaffold, and the price without the adjustable leg is $134.65, and the price with the leg is $144.85, again a difference of $10.20.

Mr. Bronson: I will ask that that go into evidence and be marked, if the Court please.

(Whereupon price list referred to above was received in evidence and marked as Defendant's Exhibit S.)

Mr. Bronson: Q. Assuming that there has been some difference in prices with the passage of time, let us say from 1952 and 1953, can you state generally whether any variations in the pricing of that particular part of your product the differential is about the same for this, or is it substantially different?

(Testimony of Victor W. Meng.)

A. No, I would say it would be about the same.

Q. Have you any figures on the actual breakdown of the cost of the making of this particular leg?

A. I do.

Q. Will you produce it, please, and I will ask you some questions. In the first place, have you got it broken down for [212] labor and for material?

A. Yes, sir.

Q. On a per-unit basis rather than for a whole scaffold? A. On a per-unit basis.

Q. That would be for a single leg?

A. This happens to be for a single section, two legs.

Q. Two legs?

A. A single ladder; that takes two legs.

Q. Will you state what your cost figures are? Is this something you got up for the trial or is it part of your normal records in connection with cost finding in your business?

A. This was taken from our cost finding, was brought along by myself, and I made it up here.

Q. In other words, can you state whether or not finding your costs of production is one of the elements that goes into fixing your sales price?

A. Definitely.

Q. You have to know it?

A. Oh, definitely.

Q. Getting down to a two-leg unit, tell us what the labor costs, what the material costs, and any other element that goes into your costs under your cost-finding scheme for this adjustable leg.

(Testimony of Victor W. Meng.)

A. The welding on the—welding labor for welding the nut into the bottom of the leg amounts to three minutes and decimal [213] oh, four, five seconds (3.045), and the labor cost of that is eleven and a quarter cents.

Q. Is that for one leg or two?

A. That is for two legs. Machining and preparing and labor is ten cents and 10.5 cents.

Q. Does that include threading?

A. No, the threading comes in material; that is bought threaded.

Q. You go right ahead.

A. This makes a total cost of labor 21.3 cents. You have your overhead, a hundred per cent, is 21.3.

Q. What is overhead? Is that all of your shop management, administration and so on?

A. That is your shop management overhead.

Q. Does that include sales expense?

A. No, sir.

Q. All right.

A. The material cost is $1.118, giving a total cost of $1.60, and to that we have added 50 per cent mark-up or $2.40.

Q. Your actual cost inclusive of all elements except sales costs comes to $2.40 for two units?

A. That is right.

Q. Or $1.20 for one unit?

A. $1.20 per leg. [214]

Q. Per leg. Now do you sell the legs separately?

(Testimony of Victor W. Meng.)

A. Are you now referring to the caster or to the caster with the screw?

Q. You answer it as best you can. Do you sell the leg without the caster?

A. On an aluminum scaffold it is sold separately only for repair purposes, unless it is the type of scaffold that does not have this particular type of leg. Where it has the loose leg we sell them separately all the time.

Q. We will leave those out because we are limiting it to this type. So that they are sold for repairs as a separate item? A. That is right.

Q. You quoted these prices. Do you have a substantial demand for the aluminum scaffold, that is, the portable scaffold, without the adjustable leg?

A. The demand for the aluminum scaffold without—did you say without the adjustable leg?

Q. Yes.

A. That will run about 30 per cent.

Q. By the way, where are these scaffolds made?

A. These particular scaffolds are made in Long Island City and also in Los Angeles.

Mr. Mellin: Where?

The Witness: Los Angeles. [215]

Mr. Mellin: Q. And where else?

A. Long Island City.

Mr. Bronson: Q. You were required, under usual discovery procedures that this Court provides, to answer certain interrogatories proposed to you by the plaintiffs in this case?

A. That is right.

(Testimony of Victor W. Meng.)

Q. And you did answer them and completed them and turned them over to counsel for filing?

A. That is correct.

Mr. Bronson: We would like to introduce as an exhibit in this case the answers to the interrogatories proposed to and answered by this witness. I will state the purpose of it. It only goes to a portion of it, Your Honor; and he supplied without request this data that I have secured by question and answer and by the last exhibit. And I would like the interrogatories in for that purpose. * * * * * [216]

Mr. Mellin: If I may suggest, Mr. Bronson, why not offer a copy that you have in your file? I will agree that it may be put in in lieu of the other.

Mr. Bronson: I will supply that.

That is all of the direct examination of Mr. Meng.

Cross Examination

Mr. Mellin: Q. Mr. Meng, as I understood you to say, you sold these legs of this—you know the device you are charged to infringe here?

A. Yes, sir.

Q. Separately. Inasmuch as part of that assembly is part of this whole scheme, that is the nut and this a collar; would you explain to me how you could sell that assembly separately?

A. I think you will find in my testimony that I said that we sold the screw and caster separately for repair purposes.

Mr. Mellin: That is all.

(Testimony of Victor W. Meng.)

The Witness: But we do occasionally sell the upper part where it is welded directly to the leg.

Mr. Mellin: Q. No device of that kind has been shown here? A. No.

Q. As I understand it, up until about 1951—did you say you advertised before then, that you advertised these legs which we are complaining are infringed?

A. I will have to refer back to the date of that exhibit; that was the first time they were shown.

The Court: October 1950.

Mr. Mellin: Q. Is this the exact type of leg of which we are complaining?

A. The illustration, no, but the comments that I quoted before, yes.

Q. Actually the exact type of which we are complaining you did not put out until some time in the latter part of '51; is that correct?

A. You mean by that the shrunken size that you have there?

Q. Yes. A. That is correct.

Mr. Mellin: That is correct. That is all.

Mr. Bronson: That is all, Mr. Meng.

(Witness excused.)

Mr. Bronson: The defendant will rest, Your Honor.

Defendant Rests. * * * * * [218]

Mr. Bronson: I have a short motion and a memorandum of authorities. I thought if they are of advantage to counsel and the Court I would hand those in now after the jury is excused, just merely

anticipating the conclusion of the rebuttal.

The Court: Yes, you can.

Mr. Bronson: You can have them overnight. I will make service on both Court and counsel now.

The Court: That is all right. [219]

* * * * *

WALLACE J. S. JOHNSON

a plaintiff herein, was called as a witness on his own behalf in rebuttal, who having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Direct Examination

Mr. Mellin: Q. Mr. Johnson, you heard Mr. Meng testify yesterday to the effect that legs of the character of the patent in suit shown on Exhibit 8 were, because of the weight of steel scaffolding, unusable in steel scaffolding of the portable type. You heard that question and answer?

A. Yes.

Q. What have you to say to that; is that correct or incorrect?

A. Well, this type of leg mechanism under suit today could be applied to a scaffolding of any metal, either steel, aluminum [221] or otherwise.

Q. What is the actual mechanical thing that is the load sustaining part of the leg, Mr. Johnson?

A. The thread of the nut imbedded in the thread of the inner leg is what sustains the load.

Q. Would you look at Exhibit 12. I understand that was used with steel scaffolding?

(Testimony of Wallace A. S. Johnson.)

A. Yes, this type of leg is used with steel scaffolds for many, many years; that is the basic leg in this particular one, but I mean the type wherein there is a nut that threads on an inner screw and is called a screw jack.

Q. That is what——

A. Turning the nut raises the scaffold by pushing on the thread of this tubular leg.

Q. In that type of device of steel scaffolding what is the mechanical thing or element which supports the load?

A. The same thing as in the patent under discussion; in other words, the threads of the nut imbedded in the threads of the inner leg is what supports the load.

Q. So as I understand it, this threaded connection between the nut underneath here and the threads that support the load in Exhibit 12 were used in steel scaffolds as they have in here in the aluminum scaffold; is that correct? A. Yes.

Q. Mr. Johnson, some question has been raised as to the use [222] of a straight section of the inner leg in the patented device. Would you state to us the importance of that element in the combination, if it has any?

A. It is of vital importance.

Q. Could you demonstrate that for us, please?

Mr. Mellin: May he approach the scaffold, Your Honor?

The Court: Certainly.

(Testimony of Wallace A. S. Johnson.)

The Witness: A. This leg was a leg from Exhibit A,——

Mr. Mellin: 8-A.

The Witness: (continuing) ——which has the cylindrical unthreaded portion. To best illustrate the importance of the unthreaded portion of the leg in relation to the nut and its use with the threaded portion, we have two legs here that are identical in every respect to the leg in Exhibit 8-A, the only difference being that they have no unthreaded portion.

Mr. Mellin: Q. You have two such?

A. Yes, two such legs here identical in every respect to the legs in the scaffold Exhibit 8, but they just do not have the unthreaded portion.

Q. Will you demonstrate it? And by this you can demonstrate the importance of the unthreaded portion, Mr. Johnson? A. Yes.

Q. Would you do it, please?

A. Yes. First, by way of comparison, it would be significant to point out that on this end of the scaffold Exhibit 8 we will [223] continue to have the scaffold supported by the legs which have the unthreaded portion within them. In other words, then, this leg, even in its extended state, there will be this unthreaded portion always in there extending up inside the outer leg.

Q. What is the effect of that?

A. The effect of that unthreaded portion in there is to cause the scaffold to be stable against side loads so that it won't buckle, and because of the

(Testimony of Wallace A. S. Johnson.)

telescopic or snug fit in there there is no shakiness or wobble in the scaffold even though the leg is extended a considerable distance. It is important from the fact that a man would not have to be interested there to know whether or not his leg is threaded out any certain distance. And if he is adjusting the type of leg in the case of this leg——

Q. ——and that is Exhibit 8 in the normal patented fashion?

A. Yes, that has the unthreaded portion in there. Let us adjust this leg. Assuming there is a load on the scaffold, as there would be if you were making this type of adjustment, as soon as he gets to the end of this thread as I have now done, he can't screw the leg out any further. When he realizes he has come to the end of it, he still knows that there is the unthreaded portion in there so there is no hazard involved in screwing this leg up or down. That we will have on one end of the scaffold. On the other end of the [224] scaffold we will take out the standard legs of the type we have in here and insert the other type of legs.

Q. That is one without the unthreaded portion?

A. Yes; they are identical in every respect; merely insert them in the extended position in the end of the scaffold so that they will replace the other legs (demonstrating). Now we have inserted them in a fully extended position with only a few threads in there to make the scaffold of relatively similar height to the other end.

It is possible in actual scaffold use with a loaded

(Testimony of Wallace A. S. Johnson.)

scaffold that since you can't see the inner leg from the outside, a man would not know how far it was extended, therefore the scaffold would appear to be the same; but if anyone were up on it he would notice extreme shakiness and wobble of the scaffold, because you see actually the legs are just held by the threads and there is no stiffering portion up inside to make it stiff. So assume there were men actually up on this scaffold and this end of the scaffold as you see it was slightly low compared to the scaffold on the other end. The logical thing would be, since you can't use the quick adjustment under load, the man up above might yell down to his partner and say, "Adjust this end of the scaffold an inch or so, will you, Joe?" He will start to turn on this leg thinking that he is raising the scaffold. As he turns on this leg the thing will just fall right out on him [225] because the man up above may be shifting back and forth. That is because none of this can be certain with this type of leg when it will actually fall out, and the man won't know it is going to fall out because he has no means of seeing within the structure, even though this is screwed in tightly or in part.

Bear in mind this portable type of scaffold, where there is a single tower moved from position to position, as soon as they are working awhile, standing awhile, the next thing is to move it to the next section. Without this unthreaded portion this may be secured by just a few threads or it may be out and he doesn't know it as unthreaded. So when

(Testimony of Wallace A. S. Johnson.)

they start to move the scaffold from position to position the leg will either fall out or the leg will buckle, thereby causing a serious accident on the scaffold.

Mr. Mellin: May I offer those modified legs as Plaintiff's next in order?

(Thereupon scaffold legs marked Plaintiff's Exhibit No. 19 and received in evidence.)

Mr. Mellin: You may cross examine.

Cross Examination

Mr. Bronson: Q. Did you not observe in Court yesterday the Uecker patent with the terminal numbers 114, a leg of a scaffold? [226]

A. Yes, I recall that patent.

Q. It has got the same thing as yours, hasn't it?

A. No.

Q. Do you remember the date that it was issued?

A. Since there were two, may I see a picture of the one of the two Uecker patents to which you refer?

Q. 1938. This is the one that is up there; it is the smaller picture. We are talking now about this smooth, slideable part which you say prevents wobbling. Doesn't this one have a smooth slideable part at the top of the threading that prevents it from being unthreaded beyond that point and prevents wobble. This being a solid piece, Mr. Johnson, from here where I am pointing up to the top, and it is cut in the middle to which there is an internal spring attached and it has a long, sliding smooth

(Testimony of Wallace A. S. Johnson.)

top part to the inner member that fits snugly on the interior of the tubular outer member.

A. Yes, there is such a cylindrical portion in there; that is right.

Q. Were you present in court when Mr. White read from Mr. Uecker's patent in which he claimed that he got the same snugness that you have been at pains to point out? You remember that part of Mr. White's testimony when he read from the Uecker patent I have just shown you, number 2,203,114 where the same claim was made 16 years ago by Mr. Uecker; do you recall it or not? [227]

A. I recall discussing certain portions of that patent, yes.

Q. What I am bringing out, if you agree with me, is that 16 years ago Mr. Uecker made the same claim for that portion of his device that you are making for that portion of your device. Can you answer that yes or no?

A. Well, I will answer it no, but I have to qualify it. I am not trying to hedge on your question. It doesn't have the same function there except by itself. By itself it is true that the cylindrical portion has a snug fit within the outer portion by itself, but that is the only relationship in which the two devices have the same function.

Q. I am not going to split hairs; I will just read it so it will be clear. Column 2 of the Uecker patent at line 27:

"The collar 27 thus cooperates with the sleeve

(Testimony of Wallace A. S. Johnson.)

15 to form a unitary rigid column, and prevent wobbling of the screw 14 within the post."

You have that in mind?

A. That is one of the features of the unthreaded portion.

Q. That is one of the features of the Johnson patent, isn't it?

A. Yes, one of them; one of several.

Q. And his works as he describes it, as you understood it and your works as you demonstrated in court?

A. In respect to that one feature, yes, they are the same.

Q. I don't know whether it is important or not, but I will [228] just cover it. You referred to some testimony of Mr. Meng here yesterday about steel scaffolds. As I understood it—I could be wrong and you will be the first to correct me—the adjustment, the rough adjustment, or quick adjustment as it has been called, requires the lifting of the scaffold, does it not—somebody has to get under it and either raise it or let it down before that adjustment is going to be made, and it requires the strength of a man; isn't that right, Mr. Johnson?

A. Yes.

Q. There is one down on the Bank of America, I just passed it, 13 stores high. Those are scaffolds that are put together, are they not, piece by piece?

A. Yes.

Q. And they are taken down, demounted, and carried away in trucks; they cover 80-foot front-

(Testimony of Wallace A. S. Johnson.)

age 10 stories high, where they are putting on new stucco or paint; right? A. Yes.

Q. They have to be made out of steel because this metal won't stand that weight; isn't that true?

A. No; aluminum of this type is actually stronger than steel in this particular structure.

Q. If I can't get that admission, at least you only apply to portable scaffolds?

A. The principle is applicable only to portable steel [229] scaffolds and portable aluminum scaffolds, and the type that you have mentioned are static and not portable in any sense of the word.

Q. Assuming that the man who owns the steel scaffold may have to use it on a one-story building one day and a ten-story another, are you contending seriously that in a practical sense this has any application to steel scaffolds which are used in that way?

A. Yes, I am contending that they would, because the steel scaffolds are made in frames just like that; perhaps not so many rungs, but they are made in frames three feet high and four feet high and five feet. Many scaffolds of the modest type have only frames consisting of two steel beams with braces between them, and those do not exceed a weight which a man could readily lift with his own strength and use this type of short leg.

Mr. Bronson: All right, that is all, Mr. Johnson.

Mr. Mellin: The plaintiff rests, Your Honor.

Mr. Bronson: I have a motion to address to the Court.

The Court: Does that conclude the testimony?

Mr. Mellin: Yes, Your Honor.

Mr. Bronson: Yes, we have rested, Your Honor.

The Court: Do you wish me to excuse the jury to hear your motion?

Mr. Bronson: Yes, I think so, Your Honor. I presented [230] the motion in written form, but it may be some response will want to be made to it, and I will make it on the record.

The Court: Well, would you take the jury for the recess, please?

(Thereupon the jury retired from the courtroom, and the following proceedings were had out of the presence of the jury.)

Mr. Bronson: At this time, if the Court please, the defendant, the Patent Scaffolding Company, a corporation, makes its motion that the Court direct a verdict in favor of the defendant and specifies as grounds of the motion:

First, that the evidence is insufficient to constitute a cause of action for infringement or for any other relief against the defendant.

Second, that the issue of validity of Patent Number 2,618,496 is one of law exclusively and not a question of fact for the jury.

Third, that the invention of plaintiff described in Letters Patent as previously specified constitutes a mere aggregation of prior art and does not constitute invention.

Fourth, that the claim of the patent in suit constitutes an unpatentable aggregation of elements and not a patentable combination of elements.

Fifth, that the claim of the patent in suit embodies an aggregation of mere mechanical skills and not patentable [231] invention.

Sixth, that there is no patentable invention in the scaffold leg set forth in the claim of the patent in suit over cancelled claim 14 set forth in the file wrapper and contents, which was a cancelled claim.

If the Court please, I presented to Your Honor merely anticipatory of this motion a written motion which, if agreeable to the Court, I would like to ask be filed.

The Court: Very well.

Mr. Bronson: I also presented at the same time a memorandum of points and authorities in support of the defendant's motion for a directed verdict. I don't know whether your Honor makes memoranda of points and authorities a part of the record or not; but I mention it now, because in view of that brief and one previously handed to Your Honor which covers many issues, I do not choose to make any further argument in support, and will let those writings stand in support of the verbal argument in defense of this motion.

The Court: Mr. Bronson, before you sit down, let me say that I have looked over these matters in the evening, and I have no particular difficulty with the question of law presented because it is not a particularly difficult one as patent cases go except insofar as it is always difficult to determine the validity of a so-called combination patent, as the patent lawyers will understand. And that problem I have [232] had not infrequently. That is a far

more difficult problem for the men who write the decisions in the Appellate Court, because some times from lack of practical experience they are not aware of the very difficult question of deciding whether or not that question is one of fact or one of law, which is the main problem that I think is involved here.

I was wondering if you had any theories or views as to whether or not the issue presented is one of fact or one of law.

Mr. Bronson: We contend, as the motion indicates, that it is purely one of law. We saw that, at least to our satisfaction, before there was a word of testimony here.

If these samples of prior art, in which I am sure there will be an admission, were contained in an aggregate in the Johnson patent, worked in any different way or got any additional results, there would be something to discuss.

But you can take these little models that have come in here, and the larger ones, and demonstrate in contrast with at least some of these inventions, that they worked exactly the same, they don't add any more to the Johnson device than the sum of what they contain within themselves. Each works the same as far as operation goes, as far as its function goes, and as far as its resulting aspect goes.

So, as I understand the law, that is what constitutes an unpatentable aggregation; but that on the contrary, had you [233] evolved out of bringing these items together some new operations, some

unexpected, some surprising result that constituted more than the sum of the parts, then you would have something to send to the jury. And I can't see it in this.

The Court: What I particularly had in mind—I didn't mean to interrupt you——

Mr. Bronson: That is quite all right.

The Court: I am not so much concerned with the patentability, the validity; the question for ultimate determination is this: What are the facts upon which the question of validity is to be determined? It consists of the patent in suit with the presumption of validity that traditionally goes with it, and then on the other hand there are the prior art patents. So we have the prior art patents against the patent in suit. Is there any other fact that we have in the case? We have no expert testimony in the case. There is no one who has testified particularly as an expert upon which any conflict of evidence results or any conflict of inferences from the evidence results.

So we only have those prior patents plus the present patent if we eliminate the explanatory matter which I think presents no substantial conflict as to the question of validity; it is merely evidence that is explanatory of what is in the patent. [234]

Now when you have prior patents and you have a patent in suit and they are brought here and they are presented and they are examined and there is a conclusion to be drawn from them, is that a question of law or is that a question of fact? I

have never seen any judge write any opinion on that, except that the Appellate Court will say "Well, the judge below had the models and patents and so forth, and now they are up before us, so we can decide that question just as well as he can."

But essentially I have never seen any standard announced according to which such a decision could be made. And I don't think there could be one as such, because I think that is something that cannot be decided as a matter of theory as to whether or not a question is a question of fact or a question of law.

Now is that a question for the jury? That is the way I look at this case, and that is why I was anxious to get your views on it. Is this a case where the jury as the trier of the fact, can look at the patents, compare them with the patent in suit, and say "Well, it is our conclusion that all that the plaintiff has done is aggregated previously existing elements and that it does not constitute invention," or to the contrary, that "We have examined these other patents and we have come to the opposite conclusion as against the patent in suit?" Is that a question of fact or is that a [235] question of law?

Mr. Bronson: Well, Your Honor poses the question and I will do my best to answer it.

In every case that has gone in recent years to the Court of Appeals of this Circuit and every recent case in the Supreme Court where they held the patent invalid as a matter of law, you had the

same presumption of validity which they necessarily held to be dispelled.

Some of the cases say that it weakens the presumption when you show that the prior art that is really pertinent wasn't even considered in the Patent Office; some of them say it is destroyed. But the thing that I find out from reading cases like the Atlantic & Pacific Tea Company case, the case of Himes against Chadwick up here, and the Quick-Set case which is as recent as this—they took the presumption that goes with the issuance of letters and simply dispelled it as they had to do, as a matter of law, holding that in a case where it is a clear matter that doesn't need any more than a view of a picture of it or an explanation of how it works, then it does become a matter of law.

I don't know whether that answers Your Honor's question or not.

The Court: You mean by that what they have really decided is that under circumstances such as that the question of validity is never a question of fact, really. [236]

Mr. Bronson: That is exactly what they said. They can't have said anything else when they render a decision as they did in the Atlantic & Pacific case. That is the most recent and the rationale of the court is set out there in perhaps a little clearer language than in some of the others when they discuss aggregation against a mere combination, and they said when they used the term —it is nothing but words—a patentable combination is something that arrives at new uses that

exceeds the uses, the operation and the result in the prior patent. Here I say there is nothing left for imagination. That is the burden of our case here. You can see these things operate. We have brought them in in pictures, we have brought them in in models. And I think Your Honor, there isn't a single question of fact left under those decisions. That happens to be the state of the patent law today under the announcement of the Supreme Court.

I hope I have answered it. I am not going to labor it any further. But that would be my answer. It would do no good to read long citations from those cases; Your Honor has read them long before I did and you know them better, so I will omit that.

The Court: I asked you to get your view of it, because it would seem to me that although I have submitted the question of validity along with infringement to a jury before, the only question really in these cases, so far as I have been able to [237] see in most cases, anyway, that calls for the trier of fact to act is the infringement issue.

In that respect in this case if there is validity of the patent, I think the Court would have to instruct the jury that there was infringement, because I do not think that reasonable minds could differ that there is any difference between the two devices. But on the question of validity, I find it very difficult to see any question of fact involved, and that is why I wanted to get your views. I would like to hear from Mr. Mellin.

Mr. Mellin: If Your Honor please, I think there is a very great question of fact here, and that is the fact of invention.

Now as I understand the law, and I think I have been involved in every jury case except one that has been presented to this court in the last few years, starting with the Lyophile case before Judge Yankwich, which was the first, and terminating in this one—the only one in which I was not involved was that one before Judge Harris, and that one was reversed because there was an obvious lack of invention. The Court could look at that and probably decide there was no invention without any prior art.

The Court: I think you were in this Oxnard case.

Mr. Mellin: That is correct, Your Honor.

In the Lyophile case there wasn't any dispute as to what [238] was in the prior art. The process there was the lyophilizing process which was freeze-drying. That is the same thing, as proved in court, that happens when you put the washing on the line; when it is put out in freezing weather it freezes and the water goes off in the form of vapor by natural processes. And what they did was to dry penicillin by artificial freezing and artificial heat. That was presented to the jury by Judge Yankwich as a question of fact to determine whether or not, in view of what had been done before and what had been shown in the patent, whether or not in light of that there could be something accomplished

or a discovery that was in addition to what would occur to one skilled in the art.

The question of law as I understand it in a patent is one—and I am under no disagreement that the Court is just as able to read the prior art patents and to evaluate them and apply them as we patent lawyers; I mean that isn't the question involved,—the question is: Does the Court have to evaluate that prior art? Could two reasonable men reasonably come to a different conclusion as to whether or not the Johnson device, in view of this prior art involved something more than mechanical skill? That is the question. That isn't a question of law.

However, if there was a prior patent, as the cases say—if there was a prior patent on a scaffold leg where these [239] concepts were shown except for some minor differences in dimensions on material, where two reasonable men couldn't possibly differ on whether or not that step in advance was one beyond the skill of the calling, then it is a question of law. But where the Court has to weigh the evidence to arrive at that, then that is a question of fact.

The Court: What is that difference?

Mr. Mellin: The difference is when two reasonable men couldn't say it is beyond the skill of the calling.

Now look at this case. Here we had a patent lawyer on the stand who, when *we* was asked, had to say this, he had to take one patent on a tire stem, a split nut holding a tire stem on a tire rim,

and he said that is somewhat similar in construction; but then he had to go to find the Countryman patent and you find part of its operation; then you go to a third patent to find another part of its operation, and a fourth patent to show the general application to a scaffold or a table unit.

The question of fact is this: There isn't one patent that they could point to that showed the entire combination except for the specific embodying of one part and that part alone, Your Honor.

This same argument was raised before Your Honor in the fish case. There it was admitted conveyors were old discs that hold things were old; that eviscerating of fish by vacuum [240] was old. There were only three little narrow claims in that patent and only one sued on. There was a case where we had the same argument; they did nothing but just vary them and vary the use of them. That is what has been done here.

But where in this prior art has it been shown to the Court that there was any concept of a leg in one combination in which each part contributed to that complete ultimate result that is shown here?

The Court: I thought afterwards that I was in error in the Oxnard case in submitting the validity to the jury.

Mr. Mellin: The Circuit Court of Appeals did not think so because Judge Bone says that, "in effect appellants would have this court substitute itself for the jury, by reevaluating the evidence." This court has previously held that issues of the char-

acter here presented are questions of fact. And I am reading from that case.

I think there was a question for the jury involved there, Your Honor, and I think the question of fact for the jury there is precisely the one here. I am reading from page 659 of the Oxnard case, Your Honor. And Judge Bone in that case also said that,

"With respect to the result produced, it is not essential that a wholly new result but is sufficient if an old result is effected in a more facile, economic or efficient way." [241]

Here we have a new result. Not one of these patents according to their own testimony, effected the result that we obtained by this one combination.

Counsel has stated that it is a mere aggregation. Aggregation doesn't come into being because each of the parts are old. Aggregation means, for example, where you use old parts but the two do not contribute to one better result.

I read from that case, Your Honor, in Note 9, the second part of it.

In the Faulkner vs. Gibbs case, that was another case where the——

The Court: Of course, what Jone Bone was referring to there was the fact that it was too late to urge about that the matter should have been passed on as a matter of law because it was not urged below.

Mr. Mellin: That may be so, but his statement there——

The Court: His statement is as to substantial

evidence, which refers more to the infringement question.

Mr. Mellin: But to reevaluate the evidence.

In the Faulkner vs. Gibbs case, which wasn't before a jury, it says:

"The question of whether or not a new and useful combination is the result of mere mechanical skill or of inventive faculty is one of fact."

Now, I insist, Your Honor, that unless two reasonable men [242] like Your Honor couldn't possibly come to—that is, if a reasonable man couldn't possibly come to a different result, then it is a question of law; but if two men could reasonably differ as to whether something new and valuable in excess of that of the mere skill of the calling was provided here,—I insist that two reasonable men could come to a different opinion.

The Court: But, Mr. Mellin, what is the evidence on the subject of whether or not this is a result of a workman's knowledge or something else?

Mr. Mellin: The evidence is this, your Honor: Here it is shown that portable scaffolds have been made for many years; but that until this was produced portable scaffolds did not come into wide use. And the evidence of twenty thousand of them since that time, plus what the defendant has made, certainly indicates that.

Now what has happened? This is an invention not of a high order, as the courts call it; it is not the production of a sewing machine or something of a startling nature such as that. It is what the courts call of a secondary nature but still protects.

What happened? The defendant was making the old type. They had all the prior art before them. They were making the old type. They went along for a year or two. I think by inference it can be drawn from the evidence they couldn't [243] sell their scaffolds without this leg. And so what did they do? They didn't go and borrow one from the prior art; they deliberately copied this precise leg. By their own tribute it must be something new. The evidence is that it is one of the oldest and largest scaffolding companies in the industry.

The Court: Of course it was new, there is no question about that. But was it novel?

Mr. Mellin: If it was new, it would be novel, wouldn't it, Your Honor?

The Court: All right; it could be new in the sense that a workman had devised something that is new, but it still wouldn't be patentable.

Mr. Mellin: Well, all right, we will go to the word "patentable". Here is what happened? The testimony is that there isn't any one patent in the art which can be substituted for it. And Your Honor yourself and this court has many times said that you can't take two or three prior art devices, scramble their parts and come up with a new unit combination that produces something new and say it is anticipated by these four prior devices. And that is what we have.

We had a patent lawyer on the stand who knows the rules of law. Yet what he had to do, in order to try to anticipate the patent, was to take a device, part of the construction of one patent, part of the

mode of operation of another, part [244] of the mode of operation of a third and a fourth before he could say, "when you do all that, you find it." As I understand the rules of law on combination, you have to find in one patent the general combination which operates in substantially that mode of operation, then find the parts to be old; not just a part from here and a part from there and make a mythical device.

The Court: Where do you get that rule? I have never heard that one.

Mr. Mellin: I think unquestionably that is the law, Your Honor.

Mr. Bronson: Where do you find it?

Mr. Mellin: Let me argue my case, will you, Mr. Bronson.

The Court: A workman can find his elements any place, can't he?

Mr. Mellin: Oh, yes.

The Court: Then when he does that, if he makes some new device, the question then is, isn't it, whether or not these things are well enough known so that all he has done is take advantage of his general knowledge as a workman to put together well known devices or methods, or whether or not his using of the well known devices is something that is not the result of the ordinary activity of the workman and the artisan in his field, but goes beyond that. That is that strange line that they have set. They said nobody can define [245] it accurately. A lot of words have been used about it,

but you take one step over that line, and you take off the workman's cap and put on the inventor's.

Mr. Mellin: That is right, Your Honor. Where in the prior art does the concept of the finding that in a scaffold leg you could make the bottom part of the leg in a fashion that has been done, adding and making use of that function for a quick and a small adjustment at the same time preventing swaying and preventing accidental tipping over? Where is it in the prior art? It isn't there.

The Court: I agree with you it isn't there. The mere fact that something has considerable value and is utilitarian, it is useful and so forth, it is created, doesn't necessarily make it patentable.

Mr. Mellin: That is true, Your Honor, but——

The Court: It doesn't become patentable. It is just a question of, what did the man have at his command when he created that thing? Was he just a workman mixing his paints getting a new color, or was he suddenly adding something entirely new to the field of color? That is the question.

Mr. Mellin: We say we added something new to the field of scaffolding. You can't take a nut from a tire stem and add it to a jack, neither one of them having the same mode of operation of producing a result, and then take a table leg that is nothing like it because it is telescopic only, and [246] say that all you have to do is to put those in the pot and come up with the invention. That is where the question of fact comes in.

On the rule of law, Your Honor, I have before

me, Bates vs. Coe, 98 U.S. 31, and I tell the Court that this is the regular rule. It says this:

"Where a thing patented is an entirety consisting of a single device or combination of old elements, incapable of division or separate use, respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior art patent or printed publication or machine, and another part is found in another prior exhibit, and still another part in a third one, and from the three or a greater number of exhibits, draw the conclusion that the patentee is not the original inventor of the improvement."

That is the regular rule. Now that is exactly what the evidence shows here. They had to borrow it all. We have a device that has a new mode of operation in itself; it has produced new results in the scaffolding field, and it is substantially different from any prior patent shown. We say that it is inescapable that that is a question of fact as to whether or not, in view of that evidence, that the production of this [247] device did not involve the inventive capacity.

The Court: Let us assume that that is right and the Court is going to tell the jury in this case: "Now, members of the jury, you are going to have to decide in this case whether or not this is patentable; and you are going to have to decide it on the basis of whether you find from the evidence that this was the result of the ordinary skill of the mechanic or artisan or whether it has crossed over the line and it has become what I am telling you

constitutes invention. Members of the jury, you are going to have to decide that question, as to whether or not this is the work of a workman?"

Now what is the jury going to decide that question on?

Mr. Mellin: The jury, under the proper instructions——

The Court: It is going to study all of these prior art devices.

Mr. Mellin: Well, I think the jury——

The Court: They are not in dispute; these are all patents. They have all been issued. Nobody disputes particularly what they in themselves mean. But the question the jury is going to have to deduce is whether, looking at all of them, that shows whether or not there was a result to just the workman's ability in his field or whether it was something beyond that. That is what the jury will have to decide in this case.

Mr. Mellin: In other words, they have to evaluate that [248] evidence as to whether it was only skill or whether it was something beyond it, under proper instructions.

The Court: And beyond that they have to evaluate in that connection the prior art patents which have been explained, plus the patent in suit.

Mr. Mellin: That is correct.

The Court: They are going to have to read those patents——

Mr. Mellin: They don't have to.

The Court: So the jury is going to sit as sort of patent officers or examiners in the case.

Mr. Mellin: Well, they have to evaluate it, Your Honor; and if Your Honor evaluates and weighs the evidence, then under our Constitutional rights you have deprived us of a jury trial on that question.

The Court: But the question is, is that a question of fact?

Mr. Mellin: The courts have said so. I can't say more. It is a question of fact. It is a question of evaluating the evidence and that is what this court shouldn't do is to weigh the evidence. Now if there is no evidence to weigh to determine that question of fact of whether it went beyond mechanical skill or not——

The Court: Don't you see that that is the problem that has always confronted the higher courts? That is why they have talked about questions of validity being questions of [249] law all the time, is because when you have got only the patents before the trier of the fact or law in the matter, what question of fact have you got?

Mr. Mellin: It is the jury's province to weigh that evidence.

The Court: There is no conflict on the subject. Here are two documents, Document A and Document B. You want the jury to read Document A and you want the jury to read Document B and say what effect Document A has on Document B.

Mr. Mellin: I don't agree with Your Honor, if I may disagree with you.

The Court: Certainly.

Mr. Mellin: Here is a jury that is familiar with

what devices were put out before. As Mr. White testified, the use of split nuts is old. Now if you go on Your Honor's theory, there wasn't any invention in all of those 15 prior patents.

The Court: There might be invention, but wouldn't it be a question of law rather than a question of fact?

Mr. Mellin: I agree with Your Honor in a question of fact it is the weighing of the evidence; but they must decide what the courts have said is the factual question: Is it invention or beyond that or not?

The Court: The question of whether it is a factual question depends upon the circumstances of the particular case. [250] I can't agree that there is any rule. If that is the case, why, then there would never be any questions to be determined by a court at all in any case. If the rule is that a question of infringement or a question of validity is a question of fact, then every time there is a case, no matter whether it is a question of fact or not depending upon the circumstances, it would have to be held to be a question of fact. That is not the law.

Mr. Mellin: No, Your Honor. Your Honor, maybe I didn't make myself clear. Now you take in the Himes case, there was a claim with broad language. There was a prior art device in which that language could be applied word by word. The question of validity depended upon that, and the trier court took it away from the jury N.O.V. on the ground that under the law when the claim

reads on that prior thing, it as a matter of law is invalid.

Now if one of these prior patents had shown all of our combination except maybe for the specific construction of one piece two reasonable men couldn't agree that a skilled mechanic could make it, then it is a question of law. But I think that Your Honor deciding a case of this sort, where you must weigh the evidence and must decide that factual question as to whether or not it went beyond the skill of the calling or whether it was a step in advance, should submit it to the jury under proper instructions. If you don't, then [251] I think Your Honor has deprived us of a jury trial.

The Court: If you had a case in which there was evidence or maybe a dispute as to what constituted the ordinary skill of an artisan in a particular field you might have a possible question of fact. But all you have got in this case is the patents; you haven't got anything else.

Mr. Mellin: That is right, Your Honor, and we have the testimony that it has a mode of operation that none of the prior art devices have and a construction that is not found in any of them.

The Court: How can it be said that the jury is going to do anything else except sit as specialists to determine the meaning of these various patents?

Mr. Mellin: Well, the court has to sit that way, Your Honor.

The Court: That is because the Court sits as a matter of law the same way as the Patent Office sits. You are now talking about a jury trial.

Mr. Mellin: That is correct, Your Honor.

The Court: And a question of fact.

Mr. Mellin: But I mean——

The Court: I don't see that it deprives anybody of any constitutional rights in a patent case when all that the jury is going to be called upon to do is to interpret the meaning of the patent, and that is a hard enough job for a judge, [252] let alone bringing in twelve people from the street.

Mr. Mellin: Here it has been shown that nuts are old, tubes are old and what have you are old, and this is old. The simple question to decide is the question of fact of whether that being old, did this new concept with its new mode of operation and construction go beyond the skill of the calling on which this Court has instructed the jury?

And I think this type of defense where you find a nut in one and this and that, is just tantamount to saying, "All the words are in the dictionary, so it took no skill to write the Gettysburg Address." I don't see any difference.

The Court: If that were all there was to it, the argument would be good. The higher courts have laid down different rules with respect to these matters.

Mr. Mellin: Yes, the standard of invention that we ask to be applied.

The Court: You are familiar with what they have said in our own Ninth Circuit Court of Appeals, speaking colloquially, of these so-called combination patents, and there isn't too much way left

open for a claim of invention when you put these older elements together.

Mr. Mellin: Well, the Circuit Court of Appeals sustained the Bradley patent, it sustained the Lyophile patent, and it sustained the La*Brea* patent, in which case the Court said—and I am talking about modern cases, Your Honor, here is [253] what our Circuit Court said in——

The Court: Before you read that, let me say to you, Mr. Mellin, you wanted a jury trial in this case.

Mr. Mellin: That is correct.

The Court: If I were to give this matter the attention that it required, I would dismiss this jury for a month and consider the case as I would consider any other patent case.

Mr. Mellin: All right, Your Honor; we will accept that.

The Court: I mean these are not cases for a jury. And I don't say that in the sense that you are not entitled to a jury nor am I saying anybody should not have a jury trial in a case, because I am a very loud and articulate exponent of the jury system. But in a patent case you have the wealth of material and experience and decisional law on the subject of patents that a judge can resort to in determining the many difficult patent questions that arise, but which a jury cannot. You bring 12 people into the box and they have to decide the matter. No judge with any conscience would let the decision of a jury stand no matter which way it

goes in a patent case unless he is satisfied it is right. Isn't that true?

Mr. Mellin: Well, that would be true in any case, Your Honor.

The Court: So it is just a waste of time in most cases for juries. [254]

Mr. Mellin: If Your Honor please, I would like to——

The Court: You had a jury in the Oxnard case. Why you asked for a jury in that case I don't know. I thought it was a very clear case and I would have decided it just the same way myself, and it didn't add anything at all that there was a jury drawn in the case.

Mr. Mellin: Your Honor, may I point out to Your Honor this——

The Court: I don't mean to be personal or cranky.

Mr. Mellin: I understand, but may I point out one thing to Your Honor: We were severely criticized in Judge Roche's court by inference for having a jury. The reason for it is this: We tried a case before another inexperienced judge in this court on a patent case, and we tried it for ten days, in which the issues weren't as involved as these. We tried this case in two days. And we have found that a judge on the bench knows that he is not going wrong leaving in evidence when he is trying it for himself so all of it goes in. And we were three or four days before we got to the patent. Now there was a 10-day trial against a 2-day trial with the same issues. These patent trials are getting

so that a client can't afford them before a court; they are getting too involved.

The Court: You mean you can't try a case before a court as quicky as you can before a jury? [255]

Mr. Mellin: I tell Your Honor that in all sincerity.

The Court: Most of the lawyers say differently.

Mr. Mellin: We would before Your Honor.

The Court: I never had many long trials in patent cases.

Mr. Mellin: That is right, but you are speaking of yourself, Your Honor. Some of the other judges aren't as experienced.

The Court: Well, that isn't a personal matter.

Mr. Mellin: I know that.

The Court: There is no omnipotence in connection with the matter. Other judges try patent cases just the same.

Mr. Mellin: No; there are judges in these courts that haven't had the experience of your Honor and counsel inveigles them into just crowding the record. They don't in jury cases because the court watches it. We understand that the judge is behind the jury; if the jury makes an error the judge can correct it. But the jury trials have cost about a third of what the court trials have cost over the experience of many cases.

The Court: I would like to give consideration to the question in this case as to whether this constitutes invention or not, and I would like to give it a little more study. There are a lot of exhibits in the case. I can't pretend to have examined them

except only from the point of view of ruling on the admissibility of evidence so far. That is a [256] question, if I were trying the case, I would want to give a little more thought to. So, therefore, I don't think there is much in the point that there is a question of fact involved in this case at all, because I feel that I would have to give consideration to it if it goes to the jury or not. It is just that much of wasted time-consuming effort. If this patent is valid, then the plaintiff is entitled to a judgment because I think as a matter of law there is just no question about there being infringement. It doesn't take a Philadelphia lawyer to see that that is so. Counsel haven't made any point about that. This case depends upon the validity of the patent.

Mr. Mellin: Completely, Your Honor.

The Court: And therefore I think it is a matter that shouldn't be decided right off the bat.

Mr. Mellin: They have filed a memorandum. May we be heard in the same fashion then, Your Honor?

The Court: I wouldn't be prepared to grant a motion for a directed verdict; but I would be willing to grant a motion that would have the effect of holding that this is a question of law as it stands now. And there might be a factual question if it were determined that the patent was valid as to the amount of damages for infringement. I don't know how that would be reachable.

Mr. Mellin: If the Court once decides—— [257]

The Court: Taking it away from the jury——

Mr. Mellin: If the Court once decides——

The Court: Now, Mr. Mellin, I am not looking for any work; I have got lots of cases.

Mr. Mellin: I understand that.

The Court: A lot under submission. But if you want to waive the jury and let this case be determined in the ordinary way, I will do the best I can with it. I will have to do it anyhow.

Mr. Mellin: May we have a recess so that I can consult with my client?

The Court: All I am doing is asking for a little extra work.

Mr. Mellin: I understand, Your Honor.

The Court: Suppose we take a recess now.

(Short recess.)

Mr. Mellin: If Your Honor please, in view of the Court's suggestion, and with the Court's approval, plaintiff will waive the jury providing, however, that the Court will take under submission all of the issues in the case including that of damages.

The Court: Is that agreeable to you?

Mr. Bronson: Well, all of the issues in this case are before the Court on the pleadings. As I understand the effect of counsel's waiver it is the same as if we had tried [258] the case on this record before you right up to now and we have all rested, and it is the same as if we had tried the case before you.

The Court: You mean as if the case was now submitted to the Court?

Mr. Mellin: That is correct.

Mr. Bronson: Yes.

The Court: For decision.

Mr. Mellin: That is correct.

Mr. Bronson: And this doesn't affect either party's right, in view of any action the Court may take, to take any appeal or anything like that for either side; it is just the same as if we tried it before the Court.

The Court: I wouldn't have any hope that whatever decision I make would go free from appeal. No, I wouldn't. Well, are you both satisfied to do that?

Mr. Mellin: Yes, Your Honor.

Mr. Bronson: Yes, Your Honor.

The Court: I feel no matter what I do with the jury, if I submitted it to the jury I would have to pass on it anyhow. So it isn't going to make very much difference. I hope that nobody is going to feel badly about it because you have waived the jury. And I just want you to know that to be conscientious about it the Court would have to pass on it anyhow. [259]

Mr. Bronson: Yes.

Mr. Mellin: That is correct, Your Honor.

The Court: Bring the jury in.

Mr. Mellin: If Your Honor please, may we brief it?

The Court: Whatever you want to do. The main question is——

Mr. Mellin: The question of invention.

The Court: ——is the question of invention. And it is a somewhat close question. I think under the

state of the law the burden is more on you in that regard. [260]

* * * * *

The Court: Members of the jury, the lawyers have decided that this is too nice weather to keep you working on such an intricate problem as this. So they have decided by agreement that the case will be submitted to the Judge instead of to the jury. That will relieve you from your [261] obligations to have to hear and decide this case. So you are therefore free to go now. You may be dismissed.

* * * * * [262]

[Endorsed]: Filed December 2, 1954.

[Endorsed]: No. 14617. United States Court of Appeals for the Ninth Circuit. Up-Right, Inc., a corporation, and Wallace J. S. Johnson, Appellants, vs. Patent Scaffolding Co., Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 12, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14617

UP-RIGHT, INC., a corporation, and WALLACE J. S. JOHNSON, an individual,
Appellants,

vs.

THE PATENT SCAFFOLDING CO., INC., a corporation,
Appellee.

APPELLANTS' STATEMENT OF POINTS

Come Now, Appellants herein, Up-Right, Inc., a corporation, and Wallace J. S. Johnson, an individual, and make the following concise statement of the points on which they intend to rely:

1. The Court erred in holding United States Patent No. 2,618,496 issued November 18, 1952, invalid and void.

2. The Court erred in not holding United States Patent No. 2,618,496 issued November 18, 1952, good and valid in law.

3. The Court erred in not holding that Defendant within six years last past, infringed United States Patent No. 2,618,496.

4. The Court erred in holding that the Plaintiffs were not entitled to recover damages from Defendant.

5. The Court erred in not granting the relief as prayed for in the Amended Complaint on file herein.

Dated: January 21, 1955.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed January 21, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by the parties hereto through their respective council that only nine (9) copies of Book of Exhibits be printed and bound in the above identified appeal, said Book of Exhibits to contain plaintiffs-appellants' Exhibits 1, 4, 5, 13, 14, 15, 16 and 17 and defendant-appellee's Exhibits D, E, F, G, H, I, J, K, L, M and N.

Dated: February 18, 1955.

/s/ MELLIN, HANSCOM & HURSH,
/s/ JACK E. HURSH,
Attorneys for Appellants
/s/ C. P. GOEPEL,
/s/ E. W. BRONSON,
/s/ J. E. TRABUCCO,
Attorneys for Appellee

[Endorsed]: Filed Mar. 1, 1955. Paul P. O'Brien, Clerk.